SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1354

THE BUSINESS ROUNDTABLE, *Petitioner,*

v.

CONSUMERS UNION OF UNITED STATES, INC., ET AL.,

and

COST OF LIVING COUNCIL, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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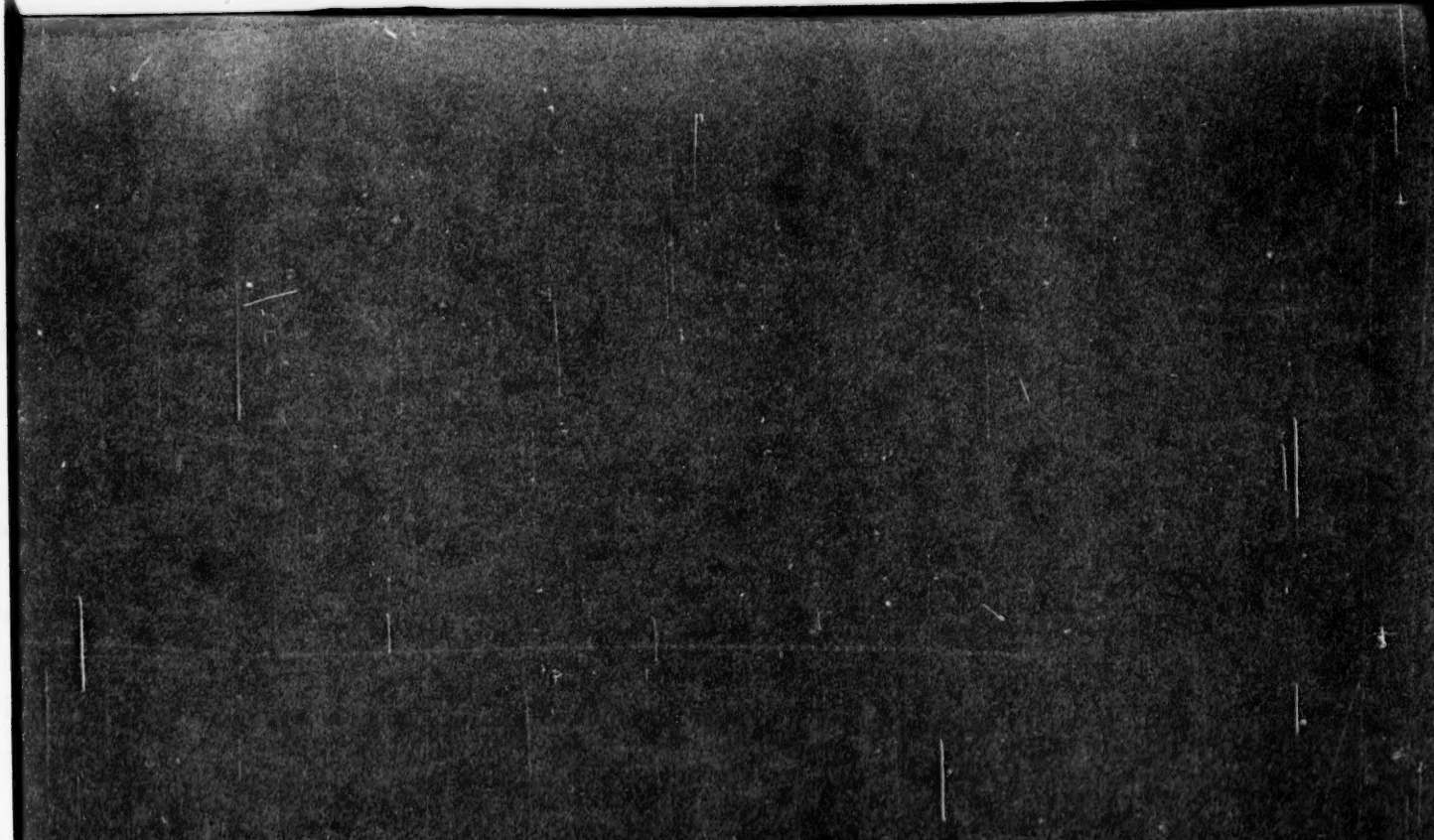

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PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

The petitioner, The Business Roundtable, respectfully prays that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals of the United States entered in this proceeding on January 11, 1974.

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals of the United States, not yet reported, appears as Appendix G hereto. No formal opinion was

rendered by the United States District Court for the District of Columbia, but the remarks of the District Judge at the conclusion of the hearing on the cross motions for summary judgment are reproduced as Appendix F hereto.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals of the United States was entered on January 11, 1974. Thereafter, timely petitions for rehearing were denied on February 4, 1974. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 85 Stat. 743.

QUESTIONS PRESENTED

1. Whether the Cost of Living Council properly interpreted Section 205 of the Economic Stabilization Act, as amended, in promulgating its public disclosure regulations.

2. Whether Section 205 of the Economic Stabilization Act, as amended, applies to public disclosure of information contained in Phase IV reports.

3. Whether waiver of the established principle of exhaustion of administrative remedies is justified in this case.

4. Whether this case is ripe for adjudication, particularly where plaintiffs have not demonstrated that the statutory prerequisites for their action exist.

5. Whether members of the public, without alleging direct injury, have standing to maintain an action to invalidate federal administrative regulations.

STATUTORY PROVISIONS INVOLVED

Economic Stabilization Act of 1970, as amended:

Section 205. *Confidentiality of information.*— (87 Stat. 27)

(a) Except as provided in subsection (b), all information reported to or otherwise obtained by any person exercising authority under this title which contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, shall be considered confidential for the purposes of that section, except that such information may be disclosed to other persons empowered to carry out this title solely for the purpose of carrying out this title or when relevant in any proceeding under this title.

(b)(1) Any business enterprise subject to the reporting requirements under section 130.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973, shall make public any report (except for matter excluded in accordance with paragraph (2)) so required which covers a period during which that business enterprise charges a price for a substantial product which exceeds by more than 1.5 per centum the price lawfully in effect for such product on January 10, 1973, or on the date twelve months preceding the end of such period, whichever is later. As used in this subsection, the term "substantial product" means any single product or service which accounted for 5 per centum or more of the gross sales or revenues of a business enterprise in its most recent full fiscal year.

(2) A business enterprise may exclude from any report made public pursuant to paragraph 1 any information or data reported to the Cost of Living Council, proprietary in nature which concerns or relates to the amount or sources of its income, profits, losses, costs, or expenditures but

may not exclude from such report, data, or information, so reported, which concerns or relates to its prices for goods and services.

(3) Immediately upon enactment of this subsection, the President or his delegate shall issue regulations defining for the purpose of this subsection what information or data are proprietary in nature and therefore excludable under paragraph (2), except that such regulations may not define as excludable any information or data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15 (d) of the Securities Exchange Act of 1934 by a business enterprise exclusively engaged in the manufacture or sale of a substantial product as defined in paragraph (1). Such regulations shall define as excludable any information or data which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus of the business enterprise.

Section 210. *Suits for damages or other relief.*—
(85 Stat. 743)

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

Section 211. *Judicial review.*—
(85 Stat. 743)

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that

nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

United States Code, Title 5:

§ *702. Right of review*

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

FEDERAL REGULATIONS INVOLVED

The CLC's Phase III public disclosure regulations are reproduced as Appendix B hereto, and the Phase IV public disclosure regulations are reproduced as Appendix D.

STATEMENT

In April 1973, Section 205 of the Economic Stabilization Act (the "Act") was amended to read as set forth above. In May 1973, the Cost of Living Council ("CLC") issued proposed regulations under Section 205 of the Act which, *inter alia,* defined what information reported by businesses to the CLC on quarterly reports was proprietary and thus exempt from public disclosure. The petitioner and others submitted comments and testified at the public hearing on the pro-

posed regulations. On June 15, 1973, the CLC issued its final regulations governing the public disclosure of information reported to the CLC in quarterly reports. 38 Fed. Reg. 16023; 6 C.F.R. §§ 102.50-102.54; Appendix B, pp. 11a-18a. The basis for the CLC's determination of what information is proprietary appears in the preamble to such regulations, which is reproduced as Appendix A, pp. 1a-10a.

On July 17, 1973, the plaintiffs (Consumers Union of United States, Inc., Peter J. Petkas, and Senator William D. Hathaway, D-Me.) filed their complaint in the United States District Court for the District of Columbia against the CLC, *et al.* seeking a declaratory judgment that certain of the CLC's public disclosure regulations, 6 C.F.R. §§ 102.50 *et seq.*, were illegal and further seeking an injunction rescinding those regulations and requiring the issuance of new regulations in compliance with Section 205 of the Act, as amended.

On July 18, 1973, the President announced the start of Phase IV, and on July 19, 1973, the CLC issued for public comment proposed regulations for the implementation of Phase IV. Included in this proposal were regulations governing quarterly reporting requirements and the public disclosure of information contained in such reports. On August 13, 1973, the final Phase IV regulations became effective, including those in issue in this case governing public disclosure of information, 6 C.F.R. §§ 102.51-102.56, Appendix D, pp. 28a-39a, although in the preamble to these regulations, Appendix C, pp. 19a-27a, the CLC expressed some doubt that Section 205 of the Act as amended, required the disclosure of such information in Phase IV. 38 Fed. Reg. 21972-73; Appendix C at pp. 21a-26a.

On August 17, 1973, Mark Silbergeld, an attorney for plaintiff Consumers Union, requested that the CLC's Assistant Director for Public Affiairs make available under the Freedom of Information Act and Section 205 of the Act, as amended certain information from the quarterly reports of six companies for the second quarter of 1973. This letter is reproduced as Appendix E, pp. 40a-41a.

On August 22, 1973, plaintiffs filed an amended complaint to reflect the fact that Phase IV regulations had replaced the Phase III regulations challenged by the original complaint. In paragraphs 2, 3 and 4 of their amended complaint, plaintiffs alleged:

> "2. Plaintiff Consumers Union of United States, Inc. ("Consumers Union") is a nonprofit membership corporation established in 1936 under the laws of the State of New York for the purpose of informing and advancing the interests of consumers. Its headquarters are located in Mount Vernon, New York. Consumers Union is the publisher of *Consumer Reports,* a monthly periodical with a paid circulation of approximately 2.2 million readers. None of Consumers Union's publications, including *Consumer Reports,* carries outside advertising. Virtually its entire income is derived from the sale of its publications, including *Consumer Reports.* Consumers Union has approximately 375,000 members in all areas of the United States and represents those members in administrative, judicial, and, upon invitation, legislative proceedings of interest to consumers.
>
> "As members of the public, all of Consumers Union's members have a direct economic interest in the administration of the Economic Stabilization Program which is designed to stem inflation adversely affecting the purchasing power of consumers, and in utilizing the information and data which the public disclosure provisions of the 1973

Amendments require to be made publicly available, in order to monitor the legality of price increases by large business enterprises. Consumers Union has testified at Council hearings, petitioned the Council for the issuance of rules, met formally and informally with Council members and staff to recommend policies related to the availability of information to consumers, and otherwise engaged in efforts to monitor and assure the effectiveness of Council administration of the Economic Stabilization Program. By letter dated August 17, 1973, Consumers Union requested the Council to provide it with certain information required to be filed by certain corporations on form CLC-2 for the second quarter of 1973, much of which requested information has been explicitly defined by the Council in its regulations as "proprietary" and therefore not subject to public disclosure. Accordingly, the Council is certain to reject these requests. For reasons set forth hereinafter, these regulations violate Section 205 of the Act, as amended. . . .

"3. Plaintiff William D. Hathaway is a United States Senator from the State of Maine, and is a citizen of Maine. Senator Hathaway was the author and sponsor of the public disclosure section of the 1973 Amendments both in the Senate Banking, Housing and Urban Affairs Committee and on the Senate floor. Senator Hathaway, as a consumer and a member of the public, has a direct interest in ensuring that the 1973 Amendments, including the public disclosure section (known as the "Hathaway Amendment"), are administered effectively and in accordance with the intent of Congress.

"4. Plaintiff Peter J. Petkas is an attorney associated with the Corporate Accountability Research Group in Washington, D.C., an organization sponsored by Ralph Nader. He regularly

studies the availability of information related to the activities of business corporations and to the possession and disclosure of such information by the Federal Government, and he frequently requests specific information of this nature from corporations and from the government. He often testifies on these subjects at the request of Committees of the Congress."

On September 14, 1973, the CLC answered the amended complaint in this case. Also on September 14, 1973, petitioner filed a motion to intervene in the case alleging that its member companies were directly affected by the CLC's public disclosure regulations which had been challenged by the plaintiffs and that such member companies would suffer serious economic injury if the plaintiffs should succeed in their effort to strike down those regulations. Petitioner's motion to intervene was granted by order of the District Court dated October 15, 1973.

In its answer to the amended complaint, petitioner essentially denied that the CLC regulations in issue violated Section 205 of the Act. As to paragraphs 2, 3 and 4 of the amended complaint quoted above, petitioner admitted only that Senator William D. Hathaway was a United States Senator from the State of Maine and a citizen of Maine. The Business Roundtable Answer ¶¶ 2, 5.

On October 1, 1973, plaintiffs moved for summary judgment and thereafter the defendants, including petitioner, filed cross motions for summary judgment. On November 2, 1973, a hearing was held on the motion and cross motions. At the conclusion of the hearing the District Court ruled that CLC's regulations did not violate Section 205 of the Act, as amended, and

granted summary judgment in favor of defendants. Appendix F, pp. 42a-43a. Orders to this effect were entered the same day.

On October 18, 1973, the CLC's Assistant Director for Public Affairs replied to Consumers Union's August 17 request for information and declined to make available much of the information sought. On November 6, 1973, Consumers Union sought an administrative appeal from this action declining to make the information available. Petitioner believes that, to date, this administrative appeal has not been acted upon.

Also on November 6, 1973, plaintiffs filed a notice of appeal in the Temporary Emergency Court of Appeals seeking review of the District Court's orders granting summary judgment for the defendants.

After briefs were filed and oral argument presented, the Temporary Emergency Court of Appeals on January 11, 1974, ordered that the cause be remanded to the District Court; that the District Court's orders denying plaintiffs' motion for summary judgment and granting defendants' motions for summary judgment be vacated; that plaintiffs' motion for summary judgment be granted; and that an injunction issue ordering the CLC to prepare and issue as soon as practicable new regulations in accordance with Section 205(b)(3) of the Act, as interpreted in the court's decision. The opinion of the Temporary Emergency Court of Appeals dated January 11, 1974, is reproduced as Appendix G, pp. 44a-57a.

In its decision the Temporary Emergency Court of Appeals ruled that, although the plaintiffs had not exhausted their administrative remedies, they could be excused for their failure to do so in this case. Appen-

dix G at pp. 45a-48a. On the merits of the appeal, the court ruled that under Section 205(b)(3) of the Act, as amended,[1] the CLC was prohibited from withholding from disclosure any information or data reported by firms to the CLC under accounting designations essentially similar to those employed in reporting to the SEC. Appendix G at pp. 50a-57a.

On January 25, 1974, petitioner and the CLC, *et al.* timely petitioned the Temporary Emergency Court of Appeals for a rehearing, asserting that the court had misinterpreted or misapprehended certain of their arguments. These petitions for rehearing were denied by order of the Temporary Emergency Court of Appeals dated February 4, 1974.

REASONS FOR GRANTING THE WRIT

In striking down the CLC's interpretation of its obligations under Section 205 of the Act, the Temporary Emergency Court of Appeals, in our view, has significantly misconstrued this complex and conflicting statutory provision, has substituted its judgment for that of the agency charged with the administration

[1] "(3) Immediately upon enactment of this subsection, the President or his delegate shall issue regulations defining for the purpose of this subsection what information or data are proprietary in nature and therefore excludable under paragraph (2), except that *such regulations may not define as excludable any information or data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 by a business enterprise exclusively engaged in the manufacture or sale of a substantial product as defined in paragraph (1).* Such regulations shall define as excludable any information or data which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus of the business enterprise." [Emphasis added]

of the Act, and has created the possibility for serious adverse consequences to business, and thus to the economy, not contemplated or intended by Congress. Furthermore, the Temporary Emergency Court of Appeals has taken this action inappropriately because the plaintiffs have failed to exhaust their administrative remmedies, the case is not ripe for adjudication at this stage, and the plaintiffs lack standing to bring this action.

I. The Decision Below Presents Significant Questions of First Impression Concerning the Extent to Which Courts Should Substitute Their Interpretation of the Economic Stabilization Act for the Interpretation of the Agency Charged With Its Administration.

The need for this Court's review of this case is most clearly evidenced by the import of the decision below. By striking down the CLC's regulations, and thus overturning the CLC's interpretation of the very act it is charged with administering, the court below has called into question the extent to which the CLC may properly determine its duties and responsibilities under the Act and thereby properly perform its functions under that Act.

A. The CLC's Interpretation of Section 205 of the Act Should Not Be Overturned by the Courts.

As the District Court found, the CLC made a good faith effort to interpret uncertain and conflicting legislation. Appendix F at p. —. In attempting to comply with the conflicting policies expressed in Section 205 of the Act, as amended, the CLC provided for the public disclosure of significant, sensitive business information,[2] but the CLC did not view the statutory

[2] For example, weighted average percentage price charged above or below base period, percentage cost justification, and percentage maximum price increase.

mandate as requiring it to subject business to the adverse consequences of wholesale disclosure of such information.

The court below has ruled that under the hypothetical test of Section 205(b)(3) of the Act,[3] the CLC possesses no discretion to determine what information or data can be excluded from public disclosure. Assuming this to be a correct interpretation of this provision of Section 205(b)(3), the court below has nevertheless denied to the CLC any leeway in determining what information reported to the CLC falls within or without the statutory mandate, namely, whether it could be excluded from public annual reports to the SEC.

The court has instead leaped to the conclusion that all information reported to the CLC under accounting designations similar to those used in SEC reporting must be publicly disclosed as a matter of law. In so holding, the court below has erred significantly and, at the same time, has impermissibly interfered with the CLC's orderly administration of the Act.

Assuming the existence of a statutory mandate withholding from the CLC any discretion to define so-called SEC data as proprietary, the CLC must nevertheless be permitted to determine what information reported to it falls within this non-discretionary mandate. In

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[3] ". . . such regulations may not define as excludable any information or data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 by a business enterprise exclusively engaged in the manufacture or sale of a substantial product as defined in paragraph (1)."

other words, the CLC's interpretation of what information reported to it qualifies as SEC data under Section 205(b)(3) of the Act should be accorded due deference by the courts and should carry great weight. *Perkins* v. *Matthews*, 400 U.S. 379, 391 (1971); *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970); *Federal Trade Comm.* v. *Texaco*, 393 U.S. 223, 226 (1968); and *Udall* v. *Tallman*, 380 U.S. 1, 4, 16 (1965).

The decision below also completely ignores what effect the conflicting policies expressed within Section 205 and its legislative history had on the CLC's determination. The CLC did not enunciate its policy of limited disclosure in a vacuum, but rather attempted to balance the competing Congressional considerations expressed. For example, subsection (a) of Section 205 states the general rule of confidentiality for all information collected by the Cost of Living Council under the Act, while subsection (b) sets forth limited circumstances under which disclosure must be made. Paragraph (1) of subsection (b) establishes a duty to disclose, while paragraph (2) of subsection (b) states that a business enterprise may exclude from a report made public certain information proprietary in nature. Paragraph (3) of subsection (b) directs the President or his delegate to issue regulations defining what information or data in quarterly reports is propietary in nature, and thus excludable, but as indicated, this paragraph further provides that so-called SEC data may not be defined as proprietary.

The legislative history of Section 205 also reflects a conflict between a policy of wholesale disclosure, on the one hand, and a concern for the protection of sen-

sitive proprietary business information, on the other hand.

At the outset of Congressional consideration of extension of the Economic Stabilization Act, Senator Hathaway proposed, and the Senate Banking Committee adopted, an amendment to Section 205. Under the first Hathaway Amendment, public disclosure would have been required of information (including costs and profits) filed with the Cost of Living Council pursuant to regulations if the company had increased the price of a "substantial product" (more than 5%) by more than 1.5 percent over a base date.

As a Floor amendment, on March 19, 1973, the Senate added the so-called Tower Amendment to Section 205. This narrowed the effect of the first Hathaway Amendment. It did so by expressly excluding from public disclosure information or data "proprietary in nature, which concerns or relates to the amount or sources of its income, profits, losses, costs, or expenditures". It did not exclude price data from the public disclosure requirement.

The next day the Senate added another amendment proposed by Senator Hathaway. That amendment stated that information could not be excluded from public disclosure, if it cannot currently be excluded from public annual reports to the SEC by single product companies.

To the extent, therefore, that the SEC on March 20, 1973, required single product companies to file information in annual reports to the SEC, that information filed with the Council by reporting companies would, under the second Hathaway Amendment, have been

disclosable, if that company increased the price of a substantial product by more than 1.5 percent.

In the House H.R. 6168, introduced by Chairman Patman of the Banking Committee, contained the Senate-passed version of Section 205. Chairman Patman, in introducing the bill in the House, stated that the public disclosure amendments to Section 205, as passed by the Senate:

> ". . . would allow a business enterprise to exclude from any report made to the public *any information which is proprietary in nature and which relates to the amount or sources of its income, profits, losses, costs or expenditures.* It may not exclude from that report data concerning its prices for goods and services." 119 Cong. Rec. H 2172 [Emphasis added]

The bill as later approved by the House Banking Committee, however, contained no public disclosure provision at all, and none was added on the House Floor. Thus, two bills diametrically opposed on the issue of public disclosure were sent to the Senate-House conference.

The Conference adopted the Senate-passed version but added a further amendment providing that the limited disclosure required by the second Hathaway Amendment would not encompass "trade secrets, processes, operations, style of work, or apparatus of the business enterprise".

When these Conference changes were discussed in the Senate, Senator Hathaway stated specifically that "the conferees made doubly sure that no one would be apprehensive that trade secrets or *other confidential matters* would be revealed to the public". 119 Cong. Rec. S 7684 [Emphasis added]

Other legislators were more explicit in their observations. In the House Congressman Rees, who served on the Conference Committee and authored the Conference amendment, explained the purpose and meaning of this amendment. He stated categorically that the amendment was designed to continue the protection accorded confidential information, including costs and profits, by 18 U.S.C. § 1905. In response to specific questioning, he stated that:

> ". . . [T]his does not force any company . . . to give away information that would hurt its *competitive information, trade secrets, source of profits,* and so forth." 119 Cong. Rec. H 3145

It was in this context that the CLC viewed its mandate narrowly and promulgated its regulations accordingly. No one seriously disputes that the CLC regulations are technically correct, *i.e.*, that the information reported to the CLC is not required to be reported in that form to the SEC and thus may be excluded from SEC reports. The gravamen of the decision below is that Congress must have intended something by enacting Section 205(b)(3); that Congress knew there would be differences in CLC and SEC data reported under similar accounting designations; and that Congress accordingly meant that data reported to the CLC under accounting designations similar to those used in reporting to the SEC could not be withheld from public disclosure. Appendix G at pp. 54a-55a.

An equally plausible view, however, is that Congress intended that companies who triggered public disclosure by raising the price of a substantial product by more than 1.5% should make available in one document or set of documents, namely its quarterly re-

ports to the CLC, sufficient information to enable the public to monitor compliance with the Phase III voluntary guidelines. Where any information on these quarterly reports was already public, that is, in reports filed with the SEC, it would seem unreasonable to permit the CLC to define this information as proprietary and thus require members of the public to acquire this information only from the SEC. Where, however, the information was not already public, *i.e.*, where it was not required to be reported to the SEC, the CLC was at liberty to define it as proprietary, as it properly did.

As this Court so aptly noted in *Udall* v. *Tallman*, *supra*, at 16:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' . . . 'Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." ' . . ." [Citations omitted]

In this case the CLC has not been accorded the deference it is due under the decisions of this Court. The court below substituted its interpretation of Section 205 for the CLC's interpretation and held the CLC's view to be incorrect. Reasonable interpretations that

would sustain the CLC were rejected. Finally, this case involves the CLC's contemporaneous construction of the statute it is charged with administering and presents a classic situation of untried and new machinery which the CLC was attempting to set into motion smoothly and with the least possible economic dislocation. These latter two considerations, as noted above, require the courts to grant particular respect to the agency's interpretation.

The court below should not have departed from these principles and overturned the CLC's interpretation of the Act.

B. The Decision of the Court Below Ignores the Fact That the Phase IV Public Disclosure Regulations Were Not Required by Section 205 of the Act.

As appears in the preamble to the Phase IV public disclosure regulations, Appendix C, pp. 19a-27a, the CLC viewed its decision to apply Section 205(b)(3) of the Act to Phase IV as a policy decision—not as a response to a statutory mandate. If this view is correct, then any decision in this case as to the proper interpretation of Section 205(b)(3) of the Act should operate only on quarterly reports filed by firms during Phase III. The decision of the court below is not so limited.

Section 205(b) of the Act states plainly that it applies to reports required "under § 130.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973." This language thus ties public disclosure under Section 205(b) to a Phase III regulation and a Phase III report. Moreover, the statutory prerequisite for public disclosure, *i.e.*, a 1.5 percent price

increase, is a Phase III standard set out in § 130.13 of the Phase III regulations.

The legislative history of the Amendments to Section 205 also supports the view that the public disclosure amendments were limited to Phase III. Indeed, Senator Hathaway, a plaintiff in this case below, viewed public disclosure as a device to induce compliance with the Phase III standard:

> "My amendment without interfering with the looser and self-administered aspects of Phase III, just gives these companies the impetus to keep price increases in line with Phase III guidelines . . . ." 119 Cong. Rec. S 5119.

The Phase III program was basically voluntary and self-administering, which led Senator Hathaway to urge that public disclosure of business information was essential "especially in view of the voluntary nature of the controls under Phase III." 119 Cong. Rec. S 5118.

When the Economic Stabilization Program moved into Phase IV the underlying reasons for the amendments to Section 205 were eliminated. Phase IV is a mandatory program and its controls do not therefore depend upon voluntary compliance with a general price standard. Indeed, in Phase IV there is no analogue to the Phase III provision permitting a company to raise prices by a weighted annual average of 1.5 percent. In Phase III a firm's increased costs could justify a price increase not only to cover those costs but also to maintain its profit margin over increased costs. In Phase IV, on the other hand, firms are restricted to a dollar-for-dollar pass-through of increased costs. In Phase III only firms with more than $250,000,000 in annual sales or revenues had to make quarterly reports. In

Phase IV such reports are required of all firms with more than $50,000,000 in annual sales or revenues.[4]

It is thus clear that the significant changes in the Economic Stabilization Program wrought by Phase IV eliminated the pressing need Congress sought to fill during Phase III by enacting the amendments to Section 205 of the Act. Accordingly, the decision in this case should not extend to reports filed during Phase IV.

II. The Decision Below Has Invalidated Federal Administrative Regulations Where the Plaintiffs Failed To Exhaust Their Administrative Remedies. There Has Been No Determination That the Case Was Ripe for Adjudication, and the Plaintiffs Lacked Standing To Sue.

A. Plaintiffs Have Failed To Exhaust Their Administrative Remedies.

Plaintiffs have failed to exhaust their administrative remedies, a failure which was noted by the Temporary Emergency Court of Appeals, but was excused by the court because of the "exceptional" circumstances of the case. Appendix G at pp. 45a-48a. On the contrary, the circumstances here involved are hardly exceptional and certainly do not compel abandonment of the long standing and well-founded doctrine that parties complaining of agency abuse cannot avail themselves of the judicial process until they have exhausted whatever administrative remedies might be available to

[4] The court below held that the public disclosure amendments to Section 205 were limited to the Phase III quarterly reporting firms. Appendix G at pp. 48a-50a. By the same logic, these amendments should be limited to reports filed during Phase III and should have no applicability to any reports filed by firms during Phase IV.

them. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1948).

The doctrine of exhaustion of administrative remedies promotes the efficient functioning of both the administrative and judicial processes by distilling the facts in a case, permitting agencies to exercise the expertise which they have acquired, and maintaining the opportunity for self-correction of administrative error so as to moot judicial controversies. *Parisi* v. *Davidson*, 405 U.S. 34 (1972); *McKart* v. *United States*, 395 U.S. 185 (1969); and *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752 (1947).

Nevertheless, it has been recognized that there are rare instances where extreme hardship to a person in excess of that normally attendant to the administrative process will result in the need for immediate judicial intervention prior to exhaustion of remedies. *Aircraft & Diesel Equipment Corp.* v. *Hirsch, supra.* These exceptions are made only in the most compelling circumstances. Immediate imprisonment as a result of a clearly invalid order would, for example, constitute valid grounds for waiver of the doctrine. *McKart* v. *United States, supra.* Similarly, "the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure," could in some cases justify judicial intervention prior to exhaustion of administrative remedies. *Aircraft & Diesel Equipment Corp.* v. *Hirsch, supra,* at 773. However, neither ordinary doubt concerning the adequacy of administrative relief nor a finding that exhaustion of remedies would be less expeditious than

the judicial remedy sought excuses failure to exhaust one's remedies unless pursuit of such remedies will certainly or probably result in the loss or destruction of substantive rights. *Aircraft & Diesel Equipment Corp.* v. *Hirsch, supra.*

The record in this case clearly demonstrates that whatever delay is involved in the exhaustion of the plaintiffs' remedies will not cause them the loss of substantial rights or result in any severe and irreparable injury. Despite the existence of CLC procedures for obtaining information filed with it, the plaintiffs have never fully availed themselves of these administrative procedures. Their complaint was filed over a month prior to their initial request for information, and to date, they have not vigorously, adequately or completely pursued the opportunities for appeal available to them following the rejection of their initial request for information.

Unless excused, the plaintiffs' failure to exhaust their administrative remedies should bar their suit. Although the court below cited reasons why the doctrine of exhaustion of administrative remedies should be waived in this case, none of these reasons appears persuasive, particularly considering the sweeping nature of the court's decision. For example, its finding that there were no factual issues in dispute and that the controversy involved a purely legal question, Appendix G at p. 46a-47a, is not entirely correct. There is no allegation or any indication in the record of this case that any company subject to the CLC Phase IV quarterly reporting requirements has raised its prices sufficiently to require the disclosure of its Phase IV report. The case is actually based on the fact that two companies were allegedly required to disclose vir-

tually all information on their CLC-2 forms because, during a Phase III reporting period, they charged a price on a substantial product in excess of 1.5 percent over the base period price. Yet the decision below broadly strikes down the CLC's regulations applicable to reports required during both Phases. Given the possibility that Section 205 of the Act may not apply to Phase IV,[5] it was particularly inappropriate for the court below to invalidate the regulations applicable to Phase IV reporting in the absence of any factual record.

The court below also observed that normally the doctrine of exhaustion of administrative remedies is followed in part to permit the agencies to amend their policies, a procedure which it noted the CLC had readily followed in the past. Appendix G at p. 47a. Nevertheless, the court seemed to assume, without substantiation, that in this case the CLC would not do so. This assumption of administrative inflexibilty is purely speculative, and there is nothing in the record to support it.

For the foregoing reasons, it is clear that no good cause exists for not applying the doctrine of exhaustion of administrative remedies in this case, especially in view of the broad scope of the decision below.

B. This Case Is Not Ripe for Adjudication.

The case brought by plaintiffs is not ripe for adjudication, and any action by the courts at this time would be premature. Specifically, these plaintiffs have never asserted that any company subject to the CLC's reporting requirements has charged, during a Phase IV

[5] See *supra*, pp. 19-21.

reporting period, a price for a substantial product in excess of 1.5 percent over the price lawfully in effect for such product on January 10, 1973, or on a date twelve months preceeding the end of the firm's reporting period. Even if Section 205 is held to extend to reports filed under Phase IV, such action by a reporting company would be a statutory prerequisite for public disclosure of any of its quarterly reports.[6]

Nowhere in their complaint, their attorney's August 17, 1973, letter requesting certain information from the CLC, the November 6, 1973, administrative appeal to the Director of the CLC, or, indeed, in the entire record in this proceeding is there any assertion that any company was, or is, required by Section 205 to make public any information included in its Phase IV quarterly reports to the CLC. It is, therefore, not known whether the application of the disclosure plaintiffs seek will affect one company, seven hundred companies, or none. In this circumstance, it was inappropriate for the court below to invalidate the CLC's regulations particularly insofar as they extend to reports filed during Phase IV.[7]

In short, plaintiffs would have the courts abandon their long standing rule that they should pass only upon concrete, specific questions in a particularized setting rather than upon a general controversy divorced from particular facts.

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[6] "[A] business enterprise . . . shall make public any report . . . which covers a period during which that business enterprise charges a price for a substantial product which exceeds by more than 1.5 per centum the price lawfully in effect for such product [etc.] . . ." Section 205(b)(1) of the Act.

[7] See *supra*, pp. 19-21.

This Court has articulated the reason for the ripeness doctrine and a twofold test to be applied:

> "Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 148-149 (1967).

Examination of the Court's application of the ripeness test in *Abbott Laboratories* v. *Gardner* and its two companion cases, *Toilet Goods Ass'n.* v. *Gardner,* 387 U.S. 158 (1967) and *Gardner* v. *Toilet Goods Ass'n.,* 387 U.S. 167 (1967), demonstrates that the plaintiffs' alleged grievance is not ripe for adjudication.

In *Abbott Laboratories* v. *Gardner,* the plaintiffs had challenged the statutory authority of the Commissioner of the Food and Drug Administration ("FDA") to issue regulations governing the labelling of drugs. The regulation had been finally adopted after notice and opportunity for comment and was considered to be final agency action within the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 704. This Court found that under the first test for ripeness the issue was appropriate for judicial resolution at that time.

The Court also found the impact of the regulations upon the plaintiffs to be sufficiently direct and im-

mediate as to render the issue appropriate for review at that time. The plaintiffs were faced with the Hobson's choice of complying with the regulations at a tremendous cost or of risking severe sanctions including civil and criminal penalties. This Court stressed the unsatisfactory nature of the alternatives to the plaintiffs and noted that the plaintiffs were in a highly sensitive industry where a loss of public confidence in their products could harm them severely. Imposition of penalties for violation of Federal regulations could produce such a lack of confidence. The Court concluded that:

> "Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted . . . ." *Abbott Laboratories* v. *Gardner, supra,* at 153.

This statement of factors compelling a finding of ripeness has been supported by the commentators. See, *e.g.,* Davis, *Administrative Law Treatise,* 1970 Suppl. Vol. at p. 675.

The Court applied the test set forth in *Abbott Laboratories* v. *Gardner* to a similar challenge to FDA regulations in *Gardner* v. *Toilet Goods Ass'n., supra,* and again found the issue appropriate for determination at that stage. The regulations had a substantial and immediate impact upon the plaintiffs, and while the risk of penalties was not as immediate as in *Abbott Laboratories* v. *Gardner,* the expenses of compliance were enormous, $42,000,000, and uncontroverted.

The Court did not find the same compelling factual situation in *Toilet Goods Ass'n.* v. *Gardner, supra.* The regulations involved, which granted the Commissioner of the FDA the right to enter the plaintiffs' premises and to suspend certification of its products in the event of refusal to permit entry, were so phrased that it could not be determined when, if ever, the Commissioner would take either action. Moreover, there was no immediate and substantial impact upon the plaintiffs. They did not have to take immediate action, no irremediable adverse consequences flowed from requiring a later challenge, and heavy civil and criminal sanctions were not a prospect. In short, the validity of the regulation was not appropriate for resolution at that time and there would be no hardship to the plaintiffs in delay.

The facts in the instant case are more similar to those in *Toilet Goods Ass'n.* v. *Gardner* than to those in its two companion cases. There has been no showing that the public disclosure trigger mechanism has been or will ever be activated during a Phase IV reporting period, and it is clear that the plaintiffs will not suffer substantial damage by being required to make a later challenge to the regulations in issue. They are not threatened by costs of compliance or substantial penalties. Indeed, no dilemma exists for the plaintiffs which requires a judicial determination prior to the occurrence of the statutory prerequisite for public disclosure and the framing of a specific limited factual situation which will ripen this matter for the courts.

C. Plaintiffs Have No Standing To Maintain This Action.

In paragraphs 2, 3 and 4 of their amended complaint for declaratory and injunctive relief, plaintiffs alleged facts purporting to establish that they possessed the

requisite standing to bring their suit against the CLC.[8] The only allegation in these paragraphs admitted by petitioner was that William D. Hathaway is a United States Senator from the State of Maine and a citizen of Maine; but even assuming all of these allegations to be true, plaintiffs nevertheless clearly lack standing to bring this suit, and the court below should not have invalidated federal administrative regulations as a result of the plaintiffs' complaint.

The plaintiffs have asserted that the federal courts have jurisdiction of this case under the Freedom of Information Act, 5 U.S.C. § 552(a)(3), the Administrative Procedure Act, 5 U.S.C. § 702, and Sections 210(a) and 211(a) of the Economic Stabilization Act. Plaintiffs' standing to sue must accordingly be founded on these statutes as well.

Section 552(a)(3) of Title 5 of the U. S. Code ties entitlement to agency records to that agency's regulations which in this case are challenged as illegal. This provision of law accordingly confers no independent standing upon plaintiffs. Section 702 of Title 5 of the U.S. Code grants a right of judicial review to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . ." Section 210(a) of the Economic Stabilization Act permits any "person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto," to bring an action in a district court. Section 211(a) of the Economic Stabilization Act gives the district courts jurisdiction of "cases or controversies" arising under the Act.

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[8] These paragraphs are set out verbatim, *supra*, pp. 7-9.

This Court has long recognized that without a direct, substantial, adverse effect upon a plaintiff, the courts are precluded from exercising their judicial power. *Muskrat* v. *United States*, 219 U.S. 346 (1911); *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923); and *Chicago and G. T. Ry.* v. *Wellman*, 143 U.S. 339 (1892). Recent decisions of this Court also make clear that in order to have standing to sue a party must have suffered injury in fact to an interest arguably within the zone of interests to be protected or regulated by the statute in issue. *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *Data Processing Service* v. *Camp*, 397 U.S. 150 (1970); and *Barlow* v. *Collins*, 397 U.S. 159 (1970). As this Court noted in *Linda R.S.* v. *Richard D.*, —— U.S. ——, 35 L.Ed. 2d 536 (1973):

> "One of the leading commentators on standing has written, 'Even though the past law of standing is so cluttered and confused that almost every proposition has some exception, the federal courts have consistently adhered to one major proposition without exception: One who has no interest of his own at stake always lacks standing.' K. Davis, Administrative Law Text 428-429 (3d ed 1972)." 35 L.Ed. 2d at 540, n. 4.

The need for some showing of injury in fact to a party reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of litigation from a person with a mere interest in the problem. *Ex parte LeVitt*, 302 U.S. 633, 634 (1937). The requirement of injury in fact is also designed to assure that litigants have a sufficient personal stake in the outcome of a case to impart the concrete adverseness required by Article III of the Constitution. *Barlow* v. *Collins, supra.*

In this case, however, plaintiffs have not shown that they are suffering any harm in fact, and any prediction of future harm to the plaintiffs as a result of implementation of the CLC's regulations is mere speculation. Plaintiffs have failed to allege a sufficient nexus between their status as consumers or a consumers' organization and their claim that they will suffer injury in fact as a result of the CLC's disclosure regulations. See *Flast* v. *Cohen*, 392 U.S. 83 (1968).

This Court has said that it has "steadfastly adhered to the requirement that . . . federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." *Linda R.S.* v. *Richard D., supra*, at 540. See *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166-167 (1972); *Flast* v. *Cohen, supra*, at 101; *Baker* v. *Carr*, 369 U.S. 186, 204 (1962); and *Massachusetts* v. *Mellon, supra*.

Viewed particularly in light of this Court's holding in *Sierra Club* v. *Morton, supra*, the plaintiffs' suit amounts to nothing more than a request for an advisory opinion on the legality of the regulation in question, which is wholly inconsistent with the judicial function under Article III of the Constitution. Where the Sierra Club had attempted unsucessfully to institute a "public" action to enjoin the issuance of permits for commercial exploitation of a national game refuge, this Court held that the Sierra Club lacked standing because it had failed to allege that its members had suffered harm in fact or that there was imminent danger of such harm occurring to its members. That case has established that an organization seeking to bring suit does not have standing to represent either the members of its organization or the public at large absent an

allegation that the organization or its members have been, or in all probability will be, adversely affected in fact by the action which the organization is seeking to challenge in court. No allegation in this case can fairly be read to comply with this standard.

In *United States* v. *SCRAP*, —— U.S. ——, 37 L.Ed. 2d 254 (1973), a recent decision of this Court discussing standing, it was held that an unincorporated association (SCRAP) formed by five law students had standing to challenge Interstate Commerce Commission decisions permitting railroads to impose a temporary 2.5% surcharge on nearly all freight rates. The student group carefully alleged in its complaint, *inter alia,* that as consumers of products, its members would pay more for finished products and, as users of the national parks, forests, streams and other resources in the Washington area for camping, hiking and sightseeing, they were directly and adversely affected by the adverse environmental impact that would be caused by the nonuse of recyclable goods brought about by a rate increase on those commodities. Although the impact of the challenged action in *SCRAP* appears more tenuous than in *Sierra Club* v. *Morton, supra,* the plaintiffs in *SCRAP* specifically asserted logical and plausible links in the causal chain—from the ICC's action to alleged injury in fact to SCRAP's members—which were deemed sufficient to justify SCRAP's standing to sue.

In this case, on the other hand, the plaintiffs have shown no basis under the cases cited herein upon which they have standing to challenge the CLC's regulations, and Consumers Union in particular lacks standing under this Court's holding in *Sierra Club* v. *Morton, supra.*

III. The Impact of the Decision Below on the Private Sector of the Economy Is a Matter of Important Public Interest.

The information which the CLC has defined as proprietary but which the ruling of the court below would require to be disclosed is confidential business data and its disclosure could result in serious detriment to business and thus to the economy.

As noted earlier in this petition, the CLC viewed its mandate under Section 205(b)(3) of the Act narrowly and did not require business firms to disclose everything they report to the CLC. This action was taken not arbitrarily or capriciously, but in response to the Congressional concern that business not be unfairly disadvantaged by being required to disclose sensitive, proprietary information. The relief granted by the court below, however, directs exactly this kind of undue disclosure and will subject disclosing firms to the risk of unfair competition from foreign and domestic competitors.

As appears in its public disclosure regulations, Appendices B, pp. 11a-18a, and D, pp. 28a-39a, the CLC's definitions of the financial data which must be reported exclude matters not relevant to the CLC's administration of the Act. Because the figures reported to the CLC are thus unique, competitors of a firm required to disclose could obtain much information about that disclosing company which would not otherwise be available.

For example, the figure for annual sales or revenues reported in quarterly reports to the CLC excludes data regarding foreign operations, 6 C.F.R. § 150.31, and the foreign operations data is separately stated as another item in such reports. On the other hand, in reporting

to the SEC, any company—even a single-product company—would state its total annual sales or revenues and would not separately state its revenues from foreign operations. It is apparently uncontroverted in the record in this case that financial information concerning a firm's foreign operations need not be disclosed under Section 205 of the Act.[9] In spite of this fact, the court below has ordered the disclosure of the CLC "annual sales or revenues" item which in turn will enable anyone to determine the amount of a disclosing firm's foreign operations by merely subtracting the CLC sales figure from the annual sales figure reported to the SEC. This anomaly, we submit, underscores the confusion which can be caused when the courts seek to substitute their judgment for that of the administrative agency in an area as technical as that involved in this case.

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[9] The CLC has defined foreign operations data as proprietary. Phase III Reg. § 102.53(a)(4)(iv), Appendix B at p. 15a; Phase IV Reg. §§ 102.55(a)(4) and 102.56(a)(4), Appendix D at pp. 33a, 37a. The petitioner has consistently supported the correctness of this view because the disclosure of such information would enable a foreign or domestic competitor of the disclosing company to acquire information not otherwise available to it and thus to compete unfairly against the disclosing company. The plaintiffs themselves have also apparently agreed that foreign operations data need not be disclosed under Section 205. Their attorney, in his letter to the CLC requesting data on six companies, Appendix E, pp. 40a-41a, requested that virtually every item contained in the quarterly reports for those companies be produced, but specifically stated that he was not asking for foreign operations data on those companies. Similarly in their complaint in this case, the plaintiffs did not challenge the correctness of the CLC's action in defining foreign operations data as proprietary. Finally, the court below, where it indicates what items of information have been improperly defined as proprietary by the CLC, significantly omits any reference to Part VI, Item 34 of the CLC-22 form entitled "Foreign Operations." Appendix G at p. 56a, n. 4.

The many examples of unfairness to the competitive business system that will result from the undue disclosure of sensitive business information need not be detailed here. Suffice it to say that it was precisely this adverse result that Congress sought to avoid when it enacted the amendments to Section 205 and instructed the CLC to compare carefully the data it required with that required by the SEC. This Court should accordingly restore the proper balance struck by the CLC when it promulgated its regulations in accordance with the intent of Congress.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Federal Register, June 20, 1973
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Title 6—Economic Stabilization

CHAPTER 1—COST OF LIVING COUNCIL

PART 102—COST OF LIVING COUNCIL
PHASE III REGULATIONS

Public Disclosure of Form CLC-2 Data

On May 11, 1973, the Cost of Living Council published proposed rule 73-1, concerning public disclosure of information reported quarterly on the form CLC-2. The Council invited interested persons to submit written data, views, and comments on the proposed rule. A substantial number of written submissions were received and public hearings were held on the matter on June 6, 1973.

In promulgating proposed rule 73-1 the Council stated that comments timely received would be taken into consideration before taking final action on the proposed regulation, and that the regulation could be changed in the light of the comments received. The Council has in fact taken into consideration all written and oral comments received by the close of business on Friday, June 8, 1973, and has changed proposed rule 73-1 in several respects to reflect these comments and to give fuller effect to congressional intent.

The new section 205 of the Economic Stabilization Act provides for public disclosure of certain information in the CLC-2 quarterly report, but only when price increases of more than 1.5 percent have been charged since January 10, 1973, on a "substantial product"—i.e., an item which accounted for 5 percent or more of sales or revenues in the firm's most recent fiscal year. For purposes of defining what must be publicly disclosed in this event, section 205 essentially divides CLC-2 information into four categories:

(1) Price data, which is specifically made subject to public disclosure;

(2) Trade data (information regarding trade secrets, processes, operations, style of work, or apparatus), which is specifically required to be withheld from public disclosure;

(3) SEC data (information on income, profits, losses, cost, or expenditures and other information which would be required to be reported to the Securities and Exchange Commission if the business enterprise were engaged in the manufacture of only one substantial product), which is specifically made subject to public disclosure; and

(4) General financial data other than SEC data (information on income, profits, losses, costs, or expenditures), which may be disclosed to the public to the extent that such information is defined as nonproprietary by the Cost of Living Council and may not be disclosed to the public to the extent it is deemed proprietary by the Council.

In determining which data is SEC data (and therefore subject to public disclosure), the Council adhered to the language of section 205(b)(3), which provides that the Council may not define as excludable from public disclosure "any information or data (on form CLC-2) which cannot currently be excluded from public annual reports to the Securities and Exchange Commission" by a firm exclusively engaged in the manufacture or sale of a substantial product. As explained in the preamble to proposed rule 73-1, the Council found that most of the data on income, profits, losses, costs, or expenditures reported on the form CLC-2 is not required to be reported on the SEC form 10-K and is not coincident with form 10-K information. By way of illustration, the preamble noted that, unlike the SEC's requirements for form 10-K, the Council's definition of "sales" for purposes of lines 1-19 of part VI of the form CLC-2 excludes sales from public utilities activities, foreign operations, insurance activities, farming, exempt

items, health service activities, custom products, and food operations. At other points, the form CLC-2 calls for data expressed as a percentage. This is significantly different from the data expressed in dollar amounts called for by SEC form 10-K.

However, the incongruence of the two types of data is more serious than a mere difference in mode of expression. For example, the 10-K reveals aggregate cost data. By contrast, form CLC-2 calls for cost data on a per unit basis. Thus a typical 10-K account of costs might be as follows:

Costs and expenses	Dec. 31, 1971	Dec. 31, 1972
Manufacturing	$35,491,000	$37,028,000
Administrative and general	5,628,000	6,044,000

The schedule C form CLC-2 for the same firm might show for any given cost element (e.g., direct materials), the following: (a) Percentage of cost element that is variable, 41 percent; (b) percentage increase (decrease) in current cost level versus primary cost level, 2 percent; (c) percentage of cost element to total costs at the primary cost level 5.5 percent; (d) the weighted value of the percentage cost increase, taking into account the percentage of the cost element to total costs, 1.1 percent. In this example, the increase in total dollar costs between 1971 and 1972, as shown in the 10-K illustration, bears no direct relationship to the cost increase or decrease per unit provided in the schedule C. The slight increase in total costs on the 10-K would not reveal a large increase in production matched by a corresponding decrease in costs per unit, or a substantial decline in production accompanied by an equivalent increase in per unit costs.

Furthermore, the increases on the schedule C are not measured by comparing the results of 1 fiscal year with another, as in the form 10-K. The schedule C calls for a comparison of costs at the primary level with those at the

current level. These are ad hoc periods selected under Cost of Living Council regulations by the reporting firm depending upon the incidence or frequency of cost increases and price increases. The period for comparison purposes may be various combinations of months or weeks and do not relate to fiscal periods. Thus, even if the basis of cost data on the CLC-2 and the 10-K were otherwise identical the data would not be comparable, and comparable SEC data would not be ascertainable or inferable from the CLC-2 data.

The necessary conclusion is that since the data called for by the CLC-2 is not required or provided on the SEC form 10-K, it is therefore data which can currently be excluded therefrom and is not specifically made subject to disclosure by section 205(b)(3). Moreover, the difference between the two types of data is so substantial as to preclude any contrary conclusion by the Council based on possible legislative intent in conflict with the explicit language of section 205(b)(3).

This information, therefore, falls into the fourth category referred to above—i.e., general financial data other than SEC data (information on income, profits, losses, costs, or expenditures which is not price data or trade data). This category of information need not be disclosed to the public to the extent it is defined as "proprietary" by the Council. In proposed rule 73-1, the Council defined all such information as proprietary. It did so on the basis of the language in section 205(b)(2) which indicates that the term "proprietary" is to have the same meaning as "confidential" in 18 U.S.C. 1905, except to the extent specifically provided in (b)(3). As explained in the preamble to proposed rule 73-1, the Council believes that "proprietary" in the new section 205 and confidential in 18 U.S.C. 1905 are to be understood as synonymous. The Council continues to believe that this is the most consistent reading of the statutory language. However, several persons commenting to the Council at the public hearing and in response to the proposed 73-1 pointed

out that a literal implementation of this interpretation would virtually nullify the language of 205(b) and frustrate the intent of Congress in enacting the amendment.

The Council thus finds itself in the position of having to reconcile a direct conflict between a literal application of the language of the amendment and its apparent intent. In this situation the Council has determined that a mechanical reading of the amendment must give way sufficiently to accommodate the intent of the Congress, while still doing as little violence as possible to the definition of "proprietary" generally intended in (b)(2).

The evident purpose of Congress in adopting this amendment was to accord members of the public access to information on CLC-2 quarterly reports sufficient to permit them to determine whether price increases were justified. The sponsor and principal supporters of the amendment indicated that this would accomplish two objectives: It would give members of the public a basis for making independent judgments on reporting companies' compliances with the rules of the Economic Stabilization program, and it would also put these companies on notice that price increases above 1.5 percent on any substantial product would subject them to public scrutiny.

In order to accommodate this objective, and in the exercise of its authority under section 205(b)(3) to define what is proprietary information, the Council in the final version of its new public disclosure regulation has made two significant changes. These changes will implement the general purpose of the new section 205 by permitting public access to sufficient information to monitor the two chief criteria of phase 3 performance: (1) Cost justification for price increases, and (2) profit margin compliance.

Under the new subpart F to part 102 of the Economic Stabilization Regulations, the Council has now designated part III, line 17, of the form CLC-2 as providing nonproprietary information subject to public disclosure. Line 17

indicates the dollar amount by which a CLC-2 entity is currently over or under its base period profit margin. The Council has also designated as nonproprietary the entire column (f) of part VI of the form CLC-2. Column (f) provides the total weighted average cost justification for each product line or entity-wide, as the case may be, where price increases are shown.

From the information now made available to the public, compliance with general standards of the program can be determined. A comparison of column (f) with the price adjustment information in column (e) will indicate whether the price increases meet the general standard of the program that all price increases be cost justified. Whenever the weighted annual average price increase in line 22, column (e), exceeds 1.5 percent over prices authorized or lawfully in effect on January 10, 1973, and a positive figure appears in part III, line 17, it will also be apparent that the firm may not be in full compliance with the general price standard which provides, in this circumstance, that the profit margin should not exceed that which prevailed during the base period.

Concern was expressed by many persons commenting on proposed rule 73-1 that disclosure of the information called for on form CLC-2 could be harmful since it would be available to foreign and domestic competitors of reporting companies. The Council believes that the changes in the proposed regulations accommodate this concern as well as the need to give effect to Congressional intent. The information required to be disclosed in part III, line 17, shows the degree of current compliance with the base period profit margin rule. It is therefore of assistance in determining compliance with the Economic Stabilization program, but does not reveal actual firm profitability. The same is generally true with respect to the information required to be disclosed under part VI, column (f). That entry shows the extent to which cost justification is ad-

vanced in support of a price increase, thereby assisting in reviewing compliance with the Economic Stabilization program, but not revealing actual cost figures.

It was brought to the Council's attention that the nonproprietary classification of information required in part I, line 5, of the CLC-2 proposed in proposed rule 73-1 was inconsistent with the proprietary treatment generally afforded similar information required in parts II, III, and VI. This entry follows the Council's special definition of annual sales or revenues in that it does not include sales or revenues from foreign operations. This type of information is not found on the SEC form 10-K. Disclosure of this information is not necessary to any purpose related to public review of cost justification and profit margin data. The Council has, therefore, now designated as proprietary part I, line 5, of the CLC-2 (annual sales or revenues of the total firm of which the entity filing the CLC-2 is a part).

It was suggested to the Council that trade data (trade secrets and the like) should be defined to include all general financial data (that which relates to income, profits, losses, costs, and expenditures). Evidence was cited from the Congressional Record in support of this view, but the Council did not find this evidence to be conclusive. Moreover, the Council disagrees with this interpretation on the ground that (1) trade data and general financial data have been treated as separate categories in both 18 U.S.C. 1905 and section 205 of the Economic Stabilization Act, (2) this interpretation would effectively nullify the authority granted to the Council in section 205(b)(3) to define what is proprietary, and (3) this interpretation would prevent the Council from giving any effect to the Council's interpretation of the general purpose of section 205 as indicated above.

Other changes have been made of an administrative nature, relating, among other things, to how public dis-

closure of the form CLC-2 is actually made when sufficient price increases have been effected to require public disclosure. Section 205 imposes the public disclosure requirement upon the business enterprise which files the CLC-2 quarterly report. However, the Council may also be required to make CLC-2 quarterly reports available to the public pursuant to the Freedom of Information Act. The Council in most cases will probably not be able to ascertain from the CLC-2 quarterly report whether sufficient price increases have been charged to require public disclosure unless further information from the business enterprise which files the CLC-2 quarterly report is provided. This is because:

(1) A "substantial product" is defined in section 205 as a product or service which accounted for 5 percent or more of the gross sales or revenues of the business enterprise's last full fiscal year. The CLC-2 does not require a breakdown by product or service of sales in the last fiscal year and the Council does not generally have this information available elsewhere.

(2) Section 205 measures the 1.5 percent price increase test from the price lawfully in effect on January 10, 1973, whereas the CLC-2 quarterly report principally measures price increases from the price level authorized on January 10, 1973. All firms required to submit the CLC-2 which raised prices in phase 2 did so pursuant to an authorization granted by the Price Commission, and in many cases the full authorization was not immediately implemented. Therefore, the authorized price on January 10, 1973 (which is the basic starting point for CLC-2 price increase measurement) for any given product or service may be above the level actually and lawfully in effect on that date.

(3) Business enterprises which have kept their weighted average price increases (overall basis) to 1.5 percent or less are entitled to submit the CLC-2 quarterly report on an abbreviated reporting basis. Under abbreviated report-

ing procedures, no breakdown of sales, prices or cost justification is provided on a product-by-product or service-by-service basis—only the overall weighted average price adjustment of 1.5 percent or less is reported on the CLC-2. Again, information as to whether an individual substantial product went over 1.5 percent will be available only to the business enterprise submitting the report.

Because of these difficulties, the Council's new public disclosure regulation requires all business enterprises which submit CLC-2 quarterly reports after the date of publication of the present regulation in the FEDERAL REGISTER to appropriately mark the face of the form CLC-2 if sufficient price increases have been charged to require public disclosure pursuant to the new section 205 of the act. This convenience will permit the Council to make the nonproprietary portions of the CLC-2 quarterly report available to the public on behalf of the business enterprise filing it and will assure prompt public disclosure in an orderly manner.

To avoid any question as to whether there is a difference between the term "business enterprise," as used in section 205 and the term "entity" as used in the CLC-2 instructions to identify the business entity to which the CLC-2 is filed applies, the Council has included a definition of business enterprise which makes it clear that a business enterprise is a CLC-2 entity.

Similarly, a definition of substantial product has been included which makes it clear that for purposes of public disclosure a substantial product is a product, product line, service, or service line as reported in lines 1-19 of part VI of the CLC-2 quarterly report, or on any continuation schedule, in accordance with CLC-2 instructions, which accounted for 5 percent or more of the business enterprise's annual sales or revenues as defined in part 130 of this title.

Finally, a more definitive statement as to the applicability of the public disclosure regulation has been included.

In consideration of the foregoing, part 102 of the title 6 of the Code of Federal Regulations is amended as set forth herein, effective June 15, 1973.

Issued in Washington, D.C., on June 15, 1973.

WILLIAM N. WALKER,
Acting Deputy Director,
Cost of Living Council.

APPENDIX B

CLC PHASE III PUBLIC DISCLOSURE REGULATIONS
6 C.F.R. §§ 102.50 *et seq.*

Effective June 15, 1973 through August 12, 1973

SUBPART F—PUBLIC DISCLOSURE OF CLC REPORTS

Sec.
102.50 Purpose and scope.
102.51 General rule.
102.52 Definitions.
102.53 Form CLC-2 data.
102.54 Disclosure procedure.

AUTHORITY.—Economic Stabilization Act of 1970, as amended, Public Law 92-210, 85 Stat. 743; Public Law 93-28, 87 Stat. 27; EO 22695, 38 FR 1473; Cost of Living Council Order No. 14, 38 FR 1489.

SUBPART F—PUBLIC DISCLOSURE OF CLC REPORTS

§ 102.50 Purpose and scope.

(a) The purpose of this subpart is to define, pursuant to section 205(b)(3) of the Economic Stabilization Act of 1970, as amended, what information or data contained in quarterly reports submitted to the Cost of Living pursuant to § 130.21(b) of this chapter is proprietary in nature and therefore excludable from public disclosure and, conversely, what information or data contained in those quarterly reports is nonproprietary in nature and therefore available to the public.

(b) This subpart applies only with respect to:

(1) A business enterprise which

(i) Is subject to the quarterly reporting requirements of § 130.21(b) of this chapter in effect on January 11, 1973; and

(ii) Charges a price for a substantial product which exceeds by more than 1.5 percent the price lawfully in effect

for such product on January 10, 1973, or on the date 12 months preceding the end of such period, whichever is later; and

(2) The form CLC-2 as submitted pursuant to the quarterly reporting requirement of § 130.21(b) of this chapter, and any schedule or supporting information or document attached thereto in accordance with the instructions to the form CLC-2.

§ 102.51 General rule.

All CLC data determined by this subpart to be proprietary data is excludable from public disclosure. All CLC data determined by this subpart to be nonproprietary data is available to the public.

§ 102.52 Definitions.

For the purpose of this subpart—

"Business enterprise" means an entity as defined in the instructions to the form CLC-2.

"CLC data" means any information or data provided on or with a quarterly report submitted to the Cost of Living Council pursuant to § 130.21(b) of this chapter when that report is subject to public disclosure pursuant to section 205(b)(1) of the Economic Stabilization Act of 1970, as amended.

"General financial data" means any CLC data, other than trade data, which concerns or relates to the amount or sources of a firm's income, profits, losses, costs, or expenditures.

"Price data" means any CLC data which concerns or relates to a firm's prices for goods and services.

"SEC data" means any general financial data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities and Exchange Act of

1934 by a firm exclusively engaged in the manufacture or sale of a substantial product as defined in section 205(b)(1) of the Economic Stabilization Act of 1970, as amended.

"Substantial product" means a product, product line, service, or service line, as called for in lines 1-19 of part VI of the form CLC-2, or any continuation schedule, in accordance with the instructions to the form CLC-2, which accounted for 5 percent or more of the business enterprise's annual sales or revenues as defined in part 130 of this title.

"Trade data" means any CLC data which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus of a firm.

§ 102.53 Form CLC-2 data.

(a) *Form CLC-2 proper.—(1) Part I (identification information).*—The information called for in part I (and in the spaces provided above part I) serves to identify or describe the firm, the type of filing, the reporting or fiscal periods in question, and the total sales or revenues of the firm for the last fiscal year. All of the information required, other than the annual sales or revenues of the firm, is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere. The annual sales or revenues of the firm (line 5) is proprietary because the Council's special definition of annual sales or revenues results in a figure not disclosed in the SEC Form 10-K.

(2) *Parts II and III (profit margin calculations).*—Except for the calendar entries in lines 6 and 7 (nonproprietary data), all general financial data furnished in parts II and III is based on base period and current period net sales and operating income as defined by the Cost of Living Council for purposes of parts II and III. These definitions are not the same as those used for SEC purposes be-

cause they exclude revenues from foreign operations, public utilities, farming activities, and insurance activities. Since such general financial data, thus more narrowly defined, is not required for SEC purposes, it can be excluded from the public annual reports to the SEC and is, therefore, defined as proprietary data with the exception of the information in line 17. In order to fulfill the general purposes of section 205 of the Economic Stabilization Act of 1970, as amended, and in exercise of the authority granted thereunder, the Council defines the information required in line 17 as nonproprietary CLC data.

(3) *Parts IV and V (other information).*—Parts IV and V call for names, titles addresses, and similar nonfinancial information, including signature and date. Everything required in these parts is nonproprietary data because it does not include either trade data or general financial data other then SEC data, and is generally available to the public elsewhere.

(4) *Part VI (price/cost information).*—The information required at the top of the page—the name of the firm, the reporting period dates and the cumulative period dates—is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere.

(i) All of the information required in columns (a) and (b) on lines 1 through 19 and on any continuation schedule is nonproprietary data because only the names of product lines or service lines and related standard industrial classification codes is required, which is neither trade data nor general financial data other than SEC data and is generally available to the public elsewhere.

(ii) The general financial data required in columns (c) and (h), lines 1 through 19 (and any continuation schedule) concerns sales by product or service line. Because the CLC definition of sales for these columns excludes sales from public utilities activities, foreign operations, insurance

activities, farming, exempt items, health service activities, custom products, and food operations, the column (c) or (h) sales entry does not coincide with the equivalent information on the SEC Form 10-K prepared as though the firm were a single-product-line firm. Therefore, the general financial data in column (c) and (h) is defined as proprietary data.

(iii) The general financial data required in columns (c) and (h), lines 20 and 21, are subtotals and totals of the individual sales entries on lines 1-19 and in any continuation schedule. This information has no counterpart on a SEC Form 10-K prepared as though the firm were a single-product-line firm and thus it is defined as proprietary data.

(iv) The general financial data required in columns (c) and (h), lines 23-25, is a breakdown of total sales into sales of or from foreign operations, food sales, and other non-applicable sales. These entries have no counterparts on any SEC form and are, therefore, defined as proprietary data.

(v) The net sales information required in columns (c) and (h), line 26 coincide in scope with the data shown in part III, line 13 (net sales). As explained in the discussion for parts II and III, this information is proprietary data.

(vi) Columns (d), (e), (g), and (i) all call for price data. All information required is therefore, nonproprietary data.

(vii) The data required in column (f) is a percentage figure representing cost justification for each product or service line entered in lines 1-19 and on any continuation schedule for which a price increase is indicated in column (e). The general financial data required in column (f), line 22, is the cost justification supporting the weighted average price increase for the combined product or service lines. These are calculations unique to the form CLC-2 and find no counterpart on the SEC Form 10-K. How-

ever, in order to fulfill the general purposes of section 205 of the Economic Stabilization Act of 1970, as amended, and in exercise of the authority granted thereunder, the Council defines the data required in column (f), lines 1-19, inclusive, line 22, and on any continuation schedule, as nonproprietary CLC data.

(b) *Schedule C (cost justification).*—(1) Part I *(identification information).*—All of the information called for in part I (and in the spaces provided above part I) serves to identify or describe the firm, the reporting period, and the product line or SIC code. All of the information is already defined as nonproprietary in part I of the form CLC-2. However, as an administrative convenience, to avoid unnecessary handling and cost of duplication of this portion of the schedule C which otherwise contains no financial data which is to be available to the public, information required by part I of schedule C is defined as proprietary.

(2) *Part II (calculation of cost justification).*—All of the general financial data called for in part II, lines 3 through 7, is calculated and entered on the basis of cost per unit of input or output. There are no counterparts for these figures on the SEC 10-K. None of the information required in lines 3 through 7 is SEC data and all of it, therefore, is defined as proprietary data.

(i) The general financial data required in lines 8 through 12 are special CLC calculations which have no counterpart in the SEC 10-K. Therefore, none of the information required is SEC data and all of it is defined as proprietary data.

(ii) The same figure that appears on line 11 of schedule C also appears in column (f) of part VI of the form CLC-2. As explained above, column (f) information is defined as nonproprietary even though it is general financial data which is not SEC data. Consistency would normally require that information required by line 11 of schedule C

also be defined as nonproprietary. However, as an administrative convenience, to avoid unnecessary handling and cost of duplication of this portion of the schedule C which otherwise contains no financial data which is to be available to the public, information required by line 11 of schedule C is defined as proprietary.

(c) *Supporting information.*—(1) Parts of the CLC-2 are required to be submitted as attachments to the CLC-2 proper. Determination of the proprietary nature of information or data shown on these attached parts is to be made on the same basis as the determination for the equivalent part on the CLC-2 proper.

(2) Supporting information prepared by the firm in textual or other form other than on a form provided by the Council must be reviewed on an ad hoc basis to determine whether or not it contains proprietary data. The rules contained in this subpart shall be used as guidelines for this purpose.

§ 102.54 Disclosure procedure.

(a) Each business enterprise submitting to the Cost of Living Council a form CLC-2 which is subject to public disclosure pursuant to section 205(b)(1) of the Economic Stabilization Act of 1970, as amended, shall:

(1) In addition to checking the box provided on the front page of the form CLC-2 under the heading "Type of Submission," to indicate the submission of a quarterly report, check the box provided for other purposes and, in the adjacent space provided, enter the words, "public disclosure required";

(2) Attach to the form CLC-2 a supporting schedule which identifies the substantial product or products which gave rise to the requirement of public disclosure and the weighted average percentage price increase or increases above the weighted average price or prices lawfully in

effect on January 10, 1973, charged for those substantial products; and

(3) Attach three copies of the entire CLC-2 submission which omit all proprietary information or data in accordance with the definitions and rules provided in § 102.53.

(b) The instructions provided in paragraph (a) of this section are in addition to the instructions to the form CLC-2.

(c) Interested persons may examine nonproprietary information or data furnished on or with form CLC-2 reports subject to public disclosure at 2000 M Street NW., Washington, D.C. 20508, or may obtain a copy of that information or data by mail upon written request addressed to the Council.

APPENDIX C

Federal Register, August 15, 1973
38 Fed. Reg. 21972-73

Title 6—Economic Stabilization

CHAPTER 1—COST OF LIVING COUNCIL

PART 102—PUBLIC ACCESS TO RECORDS

Miscellaneous Amendments

The purpose of this revision of Part 102 of Title 6 of the Code of Federal Regulations is to set out the regulations of the Cost of Living Council governing access to records during Phase IV.

These regulations are basically a continuation of the regulations in effect during Phase III. There are two major changes. First, this part now contains, in Subpart G, regulations governing inspection of Internal Revenue Economic Stabilization records. Subpart G sets out unchanged the provisions which were adopted during Phase II and set out in Chapter IV, Part 4, Subpart K.

The second major change is the adoption of regulations defining which parts of Form CLC-22 are subject to disclosure under § 205 of the Economic Stabilization Act of 1970, as amended.

Section 6 of the Economic Stabilization Act Amendments of 1973 (Public Law 93-28), enacted on April 30, 1973, required firms which met certain criteria to make public parts of their quarterly reports to the Cost of Living Council. Although section 6 required businesses, and not the Council, to disclose the reports, the Freedom of Information Act, 5 U.S.C. 552, in turn required the Council to make these reports public. Section 6 also directed the President or his delegate to issue regulations specifying what parts of those reports did not need to be made public.

In accordance with this last requirement, the Council issued proposed regulations on May 11, 1973 (38 FR 12413), held public hearings on June 6, 1973, and issued final regulations on June 20, 1973 (38 FR 16023), which appear as Subpart F of Part 102 of Title 6 of the Code of Federal Regulations.

On July 18, 1973, the President directed the Council in Executive Order 11730 to publish proposed plans for Phase IV. On July 19, 1973 the Council issued in proposed form some of the regulations for Phase IV, on which it invited public comment. These regulations were published in final form on August 7, 1973. The Council today is publishing public disclosure regulations for Phase IV, in accordance with the requirements imposed on the Council by section 6 of the Economic Stabilization Act Amendments of 1973.

Section 6 amended section 205 of the Economic Stabilization Act of 1970, which as amended reads:

Section 205 *Confidentiality of information.*

"(a) Except as provided in subsection (b), all information reported to or otherwise obtained by any person exercising authority under this title which contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, shall be considered confidential for the purposes of that section, except that such information may be disclosed to other persons empowered to carry out this title solely for the purpose of carrying out this title or when relevant in any proceeding under this title.

(b)(1) Any business enterprise subject to the reporting requirements under § 130.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973, shall make public any report (except for matter excluded in accordance with paragraph (2)) so required which covers a period during which that business enterprise charges a

price for a substantial product which exceeds by more than 1.5 per centum the price lawfully in effect for such product on January 10, 1973, or on the date twelve months preceding the end of such period, whichever is later. As used in this subsection, the term 'substantial product' means any single product or service which accounted for 5 per centum or more of the gross sales or revenues of a business enterprise in its most recent full fiscal year.

(2) A business enterprise may exclude from any report made public pursuant to paragraph 1 any information or data reported to the Cost of Living Council, proprietary in nature, which concerns or relates to the amount or sources of its income, profits, losses, costs, or expenditures but may not exclude from such report, data, or information, so reported, which concerns or relates to its prices for goods and services.

(3) Immediately upon enactment of this subsection, the President or his delegate shall issue regulations defining for the purpose of this subsection what information or data are proprietary in nature and therefore excludable under paragraph (2), except that such regulations may not define as excludable any information or data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 by a business enterprise exclusively engaged in the manufacture or sale of a substantial product as defined in paragraph (1). Such regulations shall define as excludable any information or data which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus of the business enterprise."

The application of section 205(b) is limited by its terms to any report required "under § 130.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973." Section 130.21(b) of the Council's regulations, to which section 205(b) of the Act refers, has been super-

seded for most sectors of the economy effective August 12, 1973, when Phase IV begins. The issue, therefore, is whether the amendment to section 205, which specifically incorporates a Phase III regulation, has any effect when Phase III is superseded by Phase IV.

In Phase III, firms over $250 million had to file quarterly reports, while in Phase IV firms over $50 million must file. Consequently, a subsidiary issue is whether or not section 205, assuming it remains in effect in Phase IV, applies only to firms over $250 million, or to all firms subject to the Council's Phase IV reporting requirements, i.e., all firms over $50 million in annual sales or revenues.

The reporting requirements of Phase III defined a price reporting firm as a firm with annual sales or revenues of $250 million or more, and § 130.21(b) required each price reporting firm to submit quarterly reports to the Council.

Phase IV regulations contain provisions which are analogous in their function of requiring quarterly reports, but which are far broader in their coverage. Sections 150.41 and 150.42 define Price Category I and II firms as, respectively, those firms with $100 million or more and with $50 to $100 million in annual sales or revenues. Section 150.161 requires Price Category I and II firms, with certain exceptions, to submit quarterly reports. So Phase IV's quarterly reporting requirements are far more extensive than those of Phase III. Phase III required fewer than 700 firms to report quarterly, while Phase IV will demand quarterly reports of more than four times that number.

Since section 205 is tied so specifically to a section of the Phase III regulations, and since that section is due to terminate on August 12, 1973, the strictest reading of the Act would leave section 205(b) without effect after August 11, 1973.

It is a general rule of statutory interpretation that one looks to Congressional intention only when the words of

a statute are unclear. But the Council is required in Phase IV to go behind the wording of the amendments in order to determine the extent to which the amendments modify the application of 18 U.S.C. 1905, which makes disclosure of certain information by Federal Officers a criminal offense, and which, absent the applicability of section 205, requires that the Council keep the quarterly reports confidential.

The legislative history does not speak directly to the question of whether section 205(b) was intended to survive the passing of Phase III. The discussions dealt with problems which were specific to Phase III, and it was in these terms that the amendment's sponsors presented the need for the amendments.

The report of the Senate Committee on Banking, Housing and Urban Affairs on the amendments (Report No. 93-63) stated that:

"Phase III already places the burden of combating inflationary price increases on the public. By removing from the Federal Government the initiative for enforcing price controls, and by declaring that such controls as remain be self-administered by the companies, * * * Phase III in effect determines that no action will be taken on excessive price increases unless there is a public outcry of some magnitude * * *

Public disclosure . . . should provide some counterweight to the power the self-administering aspects of Phase III give the large companies."

Senator Hathaway, who authored the amendment, said that "a disclosure provision of the sort proposed here is essential to maintain public confidence in the administration's anti-inflationary program, especially in view of the voluntary nature of the controls under Phase III" (119 Daily Cong. Rec. S 5118).

Not only was the need for public disclosure described as stemming particularly from Phase III's voluntary nature, but the remedy went into effect when a firm exceeded a standard related to the Phase III standard—the alternative price standard of a 1.5 percent weighted annual average price increase set out in § 130.13. The Senate Committee on Banking, Housing and Urban Affairs report, referred to above, stated that:

"The figure of 1.5 percent comes from the general standard for price adjustments set out in § 130.13 of the Cost of Living Council regulations * * *

* * * * * * * * * * *

The purpose of this amendment is to give the public a means of fighting price increases which exceed Phase III guidelines."

The standard set out in the Act is not the same as that found in § 130.13 of the Council regulations, in that section 205 (b)(1) of the amended Act speaks of a price "which exceeds by more than 1.5 per centum the price lawfully in effect . . . on January 10, 1973 . . . ," while § 130.13 of the Council regulations speaks of "a weighted annual average of 1.5 percent over prices authorized or lawfully in effect on January 10, 1973 . . .". Thus a firm could trigger section 205(b)(2) without violating the Phase III guideline. There were several other differences, but this was the most apparent.

It appears from the debates, however, that the Senators thought the amendment's 1.5 percent trigger and the Council's Phase III guidelines were the same. Senator Hathaway explained the amendment, which he sponsored, as requiring:

"public disclosure . . . by certain very large companies [when] * * * such a company raises the price of a substantial product by more than 1.5 percent a year—the phase

III guidelines on price increases" (119 Daily Cong. Rec. S 5118).

Senator Hathaway consistently explained his amendment in terms of the "1.5 percent guidelines" or the "phase III guidelines."

"My amendment, without interfering with the looser and self-administering aspects of phase III, just gives these companies the impetus to keep price increases in line with phase III guidelines * * *" (119 Daily Cong. Rec. S 5119).

The amendment was also tied to the specific coverage of the Council's reporting requirements—to firms with $250 million or more in annual sales or revenues. This number was cited so repeatedly that the very clear inference is that the Congress was thinking of disclosure by firms of that size or larger, rather than of requiring disclosure by any firm from which the Council might eventually require quarterly reports. Senator Hathaway said that:

"The impact of public disclosure requirement falls only in areas of great significance to the economy. The restriction to substantial products of firms with $250 [million] or more in sales or revenues means that in the case of the smallest reporting company, sales of a single product up to $12.5 million are exempt from disclosure * * *" (119 Daily Cong. Rec. S 5119).

As to the effect of a change in what the Council might require, the Senators recognized that the amendment was tied to a report of uncertain and changing content. Early in the debates Senator Hathaway put a copy of the proposed Council Form CLC-2, in the Record, and asserted that the form was currently in use (119 Daily Cong. Rec. S 5120-5121), but this misapprehension was cleared up later that day when Senator Saxbe, speaking in opposition to the public disclosure provision, said that:

The amendment requires that information filed under § 130.21B of the regulations of the Cost of Living Council

in effect January 11, 1973 shall be made public. This is an interesting requirement in that the final determination as to what cost information shall be filed and in what detail is not in existence. The Cost of Living Council is still working on the problem as to what information should be filed. (119 Daily Cong. Rec. S 5123).

The Council concludes from the legislative history that the Congress intended the public disclosure provision to apply to firms of $250 million or more, and that the disclosure provisions apply to the CLC-2's successors, and do not restrict the Council's freedom to determine what information shall be required in its quarterly reports.

The record is simply not conclusive either way in resolving the central issue of whether or not section 205(b), which incorporates a Phase III regulation, survives Phase III and has continued applicability in Phase IV.

The choice must therefore be made between the competing policy alternatives embodied in the statutory language of section 205(a), which restates a long standing Congressional policy of protecting the confidentiality of private commercial information, and that embodied in section 205(b) which articulates the desirability of greater public access to information. The Council has concluded that in this context, a policy of continuing the degree of public disclosure which pertained in Phase III must prevail.

The Council is therefore issuing, in Subpart F, regulations for Phase IV which will effectuate section 205 of the Act. These regulations require disclosure of parts of Form CLC-22 (the Phase IV successor to Form CLC-2), but apply only to firms with annual sales or revenues of $250 million or more.

These regulations are similar to those issued during Phase III in Subpart F of Part 102, except that references to § 130.21(b) are replaced by references to § 150.1(c) and § 150.161. Section 150.1(c) provides that reports due under

Phase III regulations for reporting periods ending before Phase IV, must still be filed, and § 150.161 sets out the Phase IV quarterly reporting requirements. The regulations also specify those parts of Forms CLC-2 and CLC-22 which the Council has determined contain information which is non-proprietary and therefore subject to disclosure in accordance with the procedures of this part. There is no change in the determination of what information on a Form CLC-2 is subject to disclosure.

In consideration of the foregoing, Part 102 of Title 6 of the Code of Federal Regulations is reissued as set forth below, effective August 13, 1973.

(Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11695, 38 FR 1473, E.O. 11730, 38 FR 19345, Cost of Living Council Order No. 14, 38 FR 1489)

Issued in Washington, D.C. on August 13, 1973.

JOHN T. DUNLOP,
Director,
Cost of Living Council.

APPENDIX D

CLC Phase IV Public Disclosure Regulations
6 C.F.R. §§ 102.51 *et seq.*

Effective August 13, 1973

Subpart F—Public Disclosure of CLC Reports

§ 102.51 Purpose and scope.

(a) The purpose of this subpart is to define, pursuant to section 205(b)(3) of the Economic Stabilization Act of 1970, as amended, what information or data contained in quarterly reports submitted to the Cost of Living Council pursuant to § 150.1(c) or § 150.161 of this title is proprietary in nature and therefore excludable from public disclosure and, conversely, what information or data contained in those quarterly reports is nonproprietary in nature and therefore available to the public.

(b) This subpart applies to:

(1) A business enterprise which

(i) Has annual sales or revenues of $250 million or more;

ii) Is subject to the quarterly reporting requirements of § 150.1(c) or § 150.161 of this title; and

(iii) Charges a price for a substantial product which exceeds by more than 1.5 percent the price lawfully in effect for that product on January 10, 1973, or on the date 12 months preceding the end of the quarterly reporting period, whichever is later; and

(2) A Council form submitted pursuant to the quarterly reporting requirement of § 150.1(c) or § 150.161 of this title, and any schedule or supporting information or document attached thereto in accordance with the instructions to the form.

§ 102.52 General Rule.

All CLC daa determined by this subpart to be proprietary data is excludable from public disclosure. All CLC data determined by this subpart to be nonproprietary data is available to the public.

§ 102.53 Definitions.

For the purpose of this subpart—

"Business enterprise" means an "entity" as defined in the Instructions to the Form CLC-2, and to the Form CLC-22.

"CLC data" means any information or data provided on or with a quarterly report submitted to the Cost of Living Council pursuant to § 150.1(c) or § 150.161 of this title when that report is subject to public disclosure pursuant to section 205(b)(1) of the Economic Stabilizaion Act of 1970, as amended.

"General financial data" means any CLC data, other than trade data, which concerns or relates to the amount or sources of a firm's income, profits, losses, costs or expenditures.

"Price data" means any CLC data which concerns or relates to a firm's prices for goods and services.

"SEC data" means any general financial data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities and Exchange Act of 1934 by a firm exclusively engaged in the manufacture or sale of a substantial product as defined in section 205(b)(1) of the Economic Stabilization Act of 1970, as amended.

"Substantial product" means a product, product line, service, or service line, as called for in lines 1-19 of Part VI of the Form CLC-2, and in item 24 of Part VI of the Form CLC-22, or any continuation schedule, in accordance

with the instructions to the Form CLC-2, and to the Form CLC-22, which accounted for 5 percent or more of the business enterprise's annual sales or revenues as defined for purposes of the CLC-2 in Part 130 and for purposes of the CLC-22 in Part 150 of this title.

"Trade data" means any CLC data which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus of a firm.

§ 102.54 Disclosure Procedure.

(a) Each business enterprise submitting to the Cost of Living Council a Form CLC-2 or Form CLC-22 which is subject to public disclosure pursuant to section 205(b)(1) of the Economic Stabilization Act of 1970, as amended, shall:

(1) In addition to checking the box provided on the front page of the Form CLC-2 or Form CLC-22 under the heading "Type of Submission" to indicate the submission of a quarterly report, check the box provided for "Other" purpose and, in the adjacent space provided, enter the words "Public Disclosure Required";

(2) Attach to the Form CLC-2 or Form CLC-22 a supporting schedule which identifies the substantial product or products which gave rise to the requirement of public disclosure and the weighted average percentage price increase or increases above the weighted average price or prices lawfully in effect on January 10, 1973, charged for those substantial products; and

(3) Attach three copies of the entire CLC-2 or CLC-22 submission which omit all proprietary information or data in accordance with the definitions and rules provided in § 102.55 or § 102.56.

(b) The instructions provided in paragraph (a), above, are in addition to the Instructions to the Form CLC-2 and the Instructions to the Form CLC-22.

(c) Interested persons may examine nonproprietary information or data which a firm furnishes on or with Form CLC-2 or Form CLC-22 reports subject to public disclosure at the key IRS District Office which serves the district in which the firm's corporate headquarters are domiciled.

§ 102.55 Form CLC-2 data.

(a) Form CLC-2 Proper.

(1) Part I (Identification Information).

The information called for in Part I (and in the spaces provided above Part I) serves to identify or describe the firm, the type of filing, the reporting or fiscal periods in question, and the total sales or revenues of the firm for the last fiscal year. All of the information required, other than the annual sales or revenues of the firm, is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere. The annual sales or revenues of the firm (line 5) is proprietary because the Council's special definition of annual sales or revenues results in a figure not disclosed in the SEC Form 10-K.

(2) Parts II and III (Profit Margin Calculations).

Except for the calendar entries in lines 6 and 7 (nonproprietary data), all general financial data furnished in Parts II and III is based on base period and current period "net sales" and "operating income" as defined by the Cost of Living Council for purposes of Parts II and III. These definitions are not the same as those used for SEC purposes because they exclude revenues from foreign operations, public utilties, farming activities and insurance activities. Since such general financial data, thus more narrowly defined, is not required for SEC purposes, it can be excluded from the public annual reports to the SEC and is, therefore, defined as proprietary data with the exception of the information in line 17. In order to fulfill the general purposes of Section 205 of the Economic Stabilization Act

of 1970, as amended, and in exercise of the authority required in line 17 as nonproprietary CLC data.

(3) Parts IV and V (Other Information).

Parts IV and V call for names, titles, addresses and similar non-financial information, including signature and date. Everything required in these parts is non-proprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere.

(4) Part VI (Price/Cost Information). The information required at the top of the page—the name of the firm, the reporting period dates and the cumulaive period dates—is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere.

All of the information required in Columns (a) and (b) on lines 1 through 19 and on any continuation schedule is nonproprietary data because only the names of product lines or service lines and related Standard Industrial Classification Codes is required, which is neither trade data nor general financial data other than SEC data and is generally available to the public elsewhere.

The general financial data required in Columns (c) and (h), lines 1 through 19 (and any continuation schedule) concerns sales by product or service line. Because the CLC definition of "sales" for these columns exclude sales from public utilities activities, foreign operations, insurance activities, farming, exempt items, health service activities, custom products and food operations, the Column (c) or (h) sales entry does not coincide with the equivalent information on the SEC F[illegible]m 10-K prepared as though the firm were a single-product-line firm. Therefore, the general financial data in Column (c) and (h) is defined as proprietary data.

The general financial data required in Columns (c) and (h), lines 20 and 21, are sub-totals and totals of the individual sales entries on lines 1-19 and in any continuation schedule. This information has no counterpart on a SEC Form 10-K prepared as though the firm were a single-product-line firm and thus it is defined as proprietary data.

The general financial data required in Columns (c) and (h), lines 23-25, is a breakdown of total sales into sales of or from foreign operations, food sales, and "other non-applicable sales." These entries have no counterparts on any SEC Form and are, therefore, defined as proprietary data.

The "net sales" information required in Columns (c) and (h), line 26 coincide in scope with the data shown in Part III, line 13 ("net sales"). As explained in the discussion for Parts II and III, this information is proprietary data.

Columns (d), (e), (g) and (i) all call for price data. All information required is, therefore, nonproprietary data.

The data required in Column (f) is a percentage figure representing "cost justification" for each product or service line entered in lines 1-19 and on any continuation schedule for which a price increase is indicated in Column (e). The general financial data required in Column (f), line 22, is the cost justification supporting the weighted average price increase for the combined product or service lines. These are calculations unique to the Form CLC-2 and find no counterpart on the SEC Form 10-K. However, in order to fulfill the general purpose of section 205 of the Economic Stablization Act of 1970, as amended, and in exercise of the authority granted thereunder, the Council defines the data required in Column (f), lines 1-19, inclusive, line 22, and on any continuation schedule, as nonproprietary of CLC data.

(b) Schedule C (Cost Justification).

(1) Part I (Identification Information).

All of the information called for in Part I (and in the spaces provided above Part I) serves to identify or describe the firm, the reporting period, and the product line or SIC Code. All of the information is already defined as nonproprietary in Part I of the Form CLC-2. However, as an administrative convenience, to avoid unnecessary handling and cost of duplication of this portion of the Schedule C which otherwise contains no financial data which is to be available to the public, information required by Part I of Schedule C is defined as proprietary.

All of the general financial data called for in Part II, lines 3 through 7, is calculated and entered on the basis of cost per unit of input or output. There are no counterparts for these figures on the SEC 10-K. None of the information required in lines 3 through 7 is SEC data and all of it, therefore, is defined as proprietary data.

The general financial data required in lines 8 through 12 are special CLC calculations which have no counterpart in the SEC 10-K. Therefore, none of the information required is SEC data and all of it is defined as proprietary data.

The same figure that appears on line 11 of Schedule C also appears in Column (f) of Part VI of the Form CLC-2. As explained above, Column (f) information is defined as nonproprietary even though it is general financial data which is not SEC data. Consistency would normally require that information required by line 11 of Schedule C also be defined as nonproprietary. However, as an administrative convenience, to avoid unnecessary handling and cost of duplication of this portion of the Schedule C which otherwise contains no financial data which is to be available to the public, information required by line 11 of Schedule C is defined as proprietary.

(c) Supporting Information.

Parts of the CLC-2 are required to be submitted as attachments to the CLC-2 proper. Determination of the proprietary nature of information or data shown on these attached Parts is to be made on the same basis as the determination for the equivalent Part on the CLC-2 proper.

Supporting information prepared by the firm in textual or other form other than on a Form provided by the Council must be reviewed on an ad hoc basis to determine whether or not it contains proprietary data. The rules contained in this Subpart shall be used as guidelines for this purpose.

§ 102.56 Form CLC-22 data.

(a) Form CLC-22 Proper.

(1) Part I (Identification data).

The information called for in Part I serves to identify or describe the firm, the type of filing, the reporting or fiscal periods in question, and the total sales or revenues of the firm for the last fiscal year. All of the information required, other than the annual sales or revenues of the firm, is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere. The annual sales or revenues of the firm (item 7) is proprietary because the Council's special definition of annual sales or revenues results in a figure not disclosed in the SEC Form 10-K.

(2) Parts II and III (Profit Margin Calculations).

Except for the calendar entries in items 8 and 9 (nonproprietary data), all general financial data furnished in Parts II and III is based o nbase period and current period "net sales" and "operating income" as defined by the Cost of Living Council for purposes of Parts II and III. These definitions are not the same as those used for SEC purposes because they exclude revenues from foreigh op-

erations, public utility operations, insurance operations, agricultural products, and, where required, construction operations. Since such general financial data, thus more narrowly defined, is not required for SEC purposes, it can be excluded from the public annual reports to the SEC and is, therefore, defined as proprietary data with the exception of the information in item 19. In order to fulfill the general purposes of § 205 of the Economic Stablization Act of 1970, as amended, and in exercise of the authority granted thereunder, the Council defines the information required in item 19 as nonproprietary CLC data.

(3) Parts IV and V (Additional Information).

Parts IV and V call for names, titles, addresses, and similar non-financial information, including signature and date. Everything required in these parts is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere.

(4) Part VI (Price/Cost Information). The information required in items 22 and 23—the name of the firm, and the reporting period dates—is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere.

All of the information required in Columns (a) and (b) for item 24 and on any continuation schedule is nonproprietary data because only the names of product lines or service lines and related Standard Industrial Classification Codes is required, which is neither trade data nor general financial data other than SEC data and is generally available to the public elsewhere.

The general financial data required in Column (c), item 24 (and any continuation schedule) concerns sales by product line or service line. Because the CLC definition of "sales" for this column excludes sales from public utility

operations, foreign operations, insurance operations, agricultural products, and, where required, construction operations, the Column (c) sales entry does not coincide with the equivalent information on the SEC Form 10-K prepared as though the firm were a single-product-line firm. Therefore, the general financial data in Column (c) is defined as proprietary data.

The general financial data required in Column (c), items 25 and 26, are subtotals and totals of the individual sales entries in item 24 and in any continuation schedule. This information has no counterpart on a SEC Form 10-K prepared as though the firm were a single-product-line firm and thus it is defined as proprietary data.

The general financial data required in Column (c), items 27-38, is a breakdown of total sales into sales of or from various categories such as public utilities, foreign operations, and custom products. These entries have no counterparts on any SEC Form and are, therefore, defined as proprietary data.

The "total" sales figure required in Column (c), item 39, coincides in scope with the data shown in Part III, line 15 ("net sales"). As explained in the discussion for Parts II and III, this information is proprietary data.

Column (d) is used only for prenotification purposes and is not filled out when the CLC-22 is used as a quarterly report. Columns (e) and (g) both call for price data. All information required is, therefore, nonproprietary data.

The data required in Column (f) is a percentage figure representing "cost justification" for each product line or service line entered in item 24 and on any continuation schedule for which a price increase is indicated in Column (e). These are calculations unique to the Form CLC-22 and find no counterpart on the SEC Form 10-K. However, in order to fulfill the general purpose of section 205 of the

Economic Stabilization Act of 1970, as amended, and in exercise of the authority granted thereunder, the Council defines the data required in Column (f), item 24, and on any continuation schedule, as nonproprietary CLC data.

(b) Schedule C (Cost Justification).

(1) Part I (Identification Data).

All of the information called for in Part I serves to identify or describe the firm, the reporting period, the product line, and the SIC Code. All of the information is already defined as nonproprietary in Part I of the Form CLC-22.

(2) Part II (Calculation of Cost Justification).

All of the general financial data called for in Part II, items 4 through 8, is calculated and entered on the basis of cost per unit of input or output. There are no counterparts for these figures on the SEC 10-K. None of the information required in items 4 through 8 is SEC data and all of it, therefore, is defined as proprietary data.

The general financial data required in items 9 through 11 are special CLC calculations which have no counterpart in the SEC 10-K. Therefore, none of the information required is SEC data and all of it is defined as proprietary data.

The same figure that appears on item 12 of Schedule C also appears in Column (f) of Part VI of the Form CLC-22. As explained above, Column (f) information is defined as nonproprietary even though it is general financial data which is not SEC data.

The base cost period and the current cost period are provided in items 13 and 14. This information is nonproprietary.

(c) Supporting Information.

Parts of the CLC-22 are required to be submitted as attachments to th CLC-22 proper. Determination of the

proprietary nature of information or data shown on these attached Parts is to be made on the same basis as the determination for the equivalent Part on the CLC-22 proper.

Supporting information prepared by the firm in textual or other form other than on a Form provided by the Council must be reviewed on an ad hoc basis to determine whether or not it contans proprietary data. The rules contained in this Subpart shall be used as guidelines for this purpose.

APPENDIX E

August 17, 1973

Mr. Richard Lukstadt
Assistant Director for
Public Affairs
Cost of Living Council
2000 M Street N.W.
Washington, D.C. 20508

Dear Mr. Lukstadt:

This is a request, pursuant to the Freedom of Information Act and Section 205 of the Economic Stabilization Act, as amended and Part 102, Subpart B of the Council's regulations, for records of the Council regarding information filed with the Council by certain corporations in quarterly reports under the provisions of 6 C.F.R. § 130.21. The records requested reflect reports required to be filed on or before August 15, 1973, covering the second quarter of 1973.

I request that the records specified herein be made available in your office for inspection and copying. The firms for which records are requested are:

Continental Oil Co., Stamford, Conn.
Exxon Corp., New York, New York
International Business Machines, Armonk, New York
Xerox Corp., Stamford, Conn.
E. I. Du Pont de Nemours, Wilmington, Del.
Burlington Industries, Greensboro, N.C.

The records requested should include all data or information contained in such reports which is required to be made available under Section 205, including but not necessarily limited to the following information on Form CLC-2:

1. All information contained on CLC-2, Part I, including annual sales or revenues of the reporting firms;

2. All information contained on CLC-2, Parts II and III (profit margin calculations);
3. All information contained on CLC-2, Parts IV and V (other information);
4. All information contained on CLC-2, Part VI, except sales of or from foreign operations (line 23, cols. (c) and (h)).

Data and information from Schedule C is not included in this request.

Please notify me at your earliest convenience as to when the records will be available for inspection and copying.

Sincerely,

Mark Silbergeld
Attorney, Washington Office

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSUMERS UNION OF U.S., INC., ET AL.,
Plaintiff,

VS.

COST OF LIVING COUNCIL, ET AL.,
Defendant.

Civil Action No. 1426-73

Washington, D. C.

Friday, November 2, 1973

The above-styled cause came on for hearing before THE HONORABLE GEORGE L. HART, Jr., United States District Judge, at 11:30 o'clock a.m.

APPEARANCES:

On behalf of the plaintiff:
ALAN MARK SILBERGELD, ESQ.
PETER H. SCHUCK, ESQ.

On behalf of the defendant:
MAX VASSANELLI, ESQ.

On behalf of the intervenor:
JOHN G. DEGOOYER, ESQ.

EXCERPT

THE COURT: It seems to the Court as follows: That you have here a classic example of legislation passed in a hurry which ends up in certain slipshod provisions which are very difficult for the agencies or the courts to try to understand what they really mean.

It also would appear that some of these provisions are seemingly conflicting, and it also appears that the Cost of Living Council was given certain discretion in the deter-

mination of what was proprietary and what is not proprietary.

Under the circumstances, the Court finds that the Cost of Living Council in preparing its regulations has done so in good faith in an effort to interpret uncertain and conflicting legislation, and that in doing so they have not abused their discretion, they have not acted arbitrarily or capriciously, and they have not violated Section 205 of the Economic Stabilization Act.

I will, therefore, deny the plaintiff's motion for summary judgment, and grant defendant and intervenor's motion for summary judgment.

APPENDIX G

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. DC-17

CONSUMERS UNION OF UNITED STATES, INC., ET AL.,
Plaintiffs-Appellants,

v.

COST OF LIVING COUNCIL, ET AL.,
Defendants-Appellees,
THE BUSINESS ROUNDTABLE,
Defendant-Intervenor.

Alan M. Silbergeld, Consumers Union, Washington, D.C. (Peter H. Schuck, Consumers Union and of counsel, Lobel, Novins & Lamont, with him on the brief) for the Appellants.

James Elkins, Attorney, U.S. Department of Justice, Washington, D.C. (Irving Jaffe, Acting Assistant Attorney General, William E. Nelson and William White, Attorneys, U.S. Department of Justice, with him on the brief) for the Government-Appellees.

John G. DeGooyer, Hamel, Park, McCabe & Saunders, Washington, D.C., for the Intervenor.

Before TAMM, Chief Judge, HASTIE and ESTES, Judges.

ESTES, Judge.

This is an appeal under Section 211 of the Economic Stabilization Act of 1970, as amended (the Act), by plaintiffs, Consumers Union of United States, Inc., William D. Hathaway, and Peter J. Petkas, from orders of the United States District Court for the District of Columbia denying plaintiff's motion for summary judgment and granting the motions for summary judgment made by the defendants, the Cost of Living Council (CLC), Dr. John T. Dunlop, its Executive Director, and William N. Walker, its Acting

Deputy Director, and by defendant-intervenor, The Business Roundtable.

On July 17, 1973 plaintiffs filed their complaint in the district court seeking a declaratory judgment that certain of the CLC's public disclosure regulations, 6 C.F.R. §§ 102.50 et seq., were illegal, and seeking an injunction rescinding those regulations and requiring the issuance of new regulations which comply with Section 205 of the Act. On August 22, 1973 plaintiffs filed an amended complaint to reflect the fact that Phase IV regulations had replaced the Phase III regulations challenged by the original complaint. On October 15, 1973 the motion of The Business Roundtable to intervene as a defendant was granted with defendants' approval but over plaintiffs' objection. The district court granted the defendants' and the defendant-intervenor's motions for summary judgment on November 2, 1973. Plaintiffs filed their notice of appeal with this Court on November 6, 1973.

Three principal issues are involved in this appeal. One of these issues, which has not been raised by any of the parties or the court below, will be considered first.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Part 102 of the CLC's regulations is entitled "Public Access to Records." Plaintiffs are challenging the legality of those parts of Subpart F (6 C.F.R. §§ 102.51-102.56) of Part 102 which declare what information submitted to the CLC shall or shall not be subject to public disclosure. Subparts B and C provide an administrative procedure whereby requests for information may be filed with the CLC's Assistant Director for Public Affairs. Subpart E provides that adverse determinations made by the Assistant Director may be appealed within 30 days to the Director of the CLC.

In this case no information was requested of the CLC until August 17, 1973, one month after the original com-

plaint had been filed in the district court. On that date the CLC Assistant Director received from Mark Silbergeld, an attorney for plaintiff Consumers Union, a letter request for certain information. The reply of the Assistant Director, received by the plaintiff on October 19, 1973, summarized the provisions of Subpart F and pursuant thereto refused to make available most of the information sought. On November 6, 1973, the same day that a notice of appeal was filed with this Court from the November 2, 1973 district court orders, Consumers Union wrote to the CLC Director, Dr. John T. Dunlop, to appeal from the October 19, 1973 determination by the Assistant Director. The record does not reflect that Dr. Dunlop has made a determination of the administrative appeal.

This Court follows the well-known rule requiring exhaustion of administrative remedies. *City of New York* v. *New York Telephone Co.*, 468 F.2d 1401 (T.E.C.A. 1972).[1] Clearly, plaintiffs did not exhaust their administrative remedies before filing the action below. Strict application of the doctrine would require us to dismiss this case. In determining whether to apply the doctrine, it is appropriate to consider whether the policies that give rise to the doctrine would be furthered by its application to the circumstances of the case, and whether exceptions to the rule are present.

One reason often given for requiring exhaustion is that after a dispute has been determined by all available administrative procedures, the issues in dispute between the parties will be better framed and thus more susceptible of judicial determination. In the present dispute, however,

[1] "Clearly then, in light of the policy considerations and the legislative history, exhaustion is required in the context of this proceeding unless we find the administrative remedy provided inadequate." 468 F.2d at 1404. "Furthermore, we find none of the well-known exceptions to the exhaustion rule applicable here." *Id.* n. 15.

there are no factual issues in dispute, and the question involved is a purely legal one as to whether the CLC's public disclosure regulations are in violation of Section 205 of the Act. That question was adequately framed by the pleadings and exhibits in the district court, which ruled for the defendants on their motions for summary judgment. Since there is no question as to the nature of the issues in dispute between the parties, this policy reason behind requiring exhaustion does not favor application of the doctrine to this case.

A second reason for the doctrine is that requiring exhaustion will insure that the agency is given an opportunity to apply its particular administrative expertise to the question being reviewed. This policy is usually applied to the determination of technical factual disputes or to the determination of disputes involving the agency's interpretation of its own regulations or orders. In both situations the reviewing court would be aided by having the informed opinion of the agency. In this case, however, there is neither a technical factual dispute nor a dispute involving the CLC's interpretation of its orders or regulations. Instead, as mentioned above, the dispute is a legal one only, and there is no question as to the interpretation of the CLC's regulations. Those regulations are clear; the dispute is whether they are in excess of the authority given by Section 205 of the Act. We find that this policy reason for exhaustion would not be furthered by application of the doctrine to these circumstances.

A third reason for requiring exhaustion is that if, through the administrative review process, the agency is made aware of the faults of its policies, it may change them on its own volition, thus removing the need for judicial review or making moot a pending judicial proceeding. "In this respect we have noted in our cases to date a healthy trend towards amendment of regulations when error or oversight has been pointed out to the [agency]." *City of New York* v. *New York Telephone Company*, 468 F.2d 1401,

1403 (T.E.C.A. 1972). Were it not for the fact that plaintiffs' views as to the illegality of these regulations have been repeatedly made known to the CLC since May 30, 1973, we might consider this an appropriate case for the application of this policy. On May 8, 1973 the CLC issued its proposed regulations for the implementation of Section 205, inviting interested persons to participate in the proposed rule making by submitting written data, views, or comments. On May 30, 1973 plaintiff Hathaway filed comments contending that the proposed regulations were illegal in violation of Section 205. On May 29, 1973 and June 4, 1973 plaintiff Petkas filed comments of the same import. On May 18, 1973 the CLC announced the scheduling of a hearing for June 6, 1973, for the purpose of hearing comments on the proposed regulations by interested parties. Plaintiffs Hathaway and Petkas attended the hearing and testified in opposition to the proposed regulations. On June 15, 1973 the CLC promulgated as final regulations the proposed regulations which had been the subject of the hearings and comments above. Under these circumstances it would not appear likely that the CLC would now decide to replace its regulations because of plaintiff Consumers Union's administrative appeal.

Thus we decide that under the exceptional circumstances of this case the doctrine of exhaustion of administrative remedies does not prevent our consideration of this appeal. We emphasize, however, that in the usual case arising under the Economic Stabilization Act, policies favoring exhaustion will no doubt apply, and plaintiffs should be extremely wary of commencing actions in court when an adequate administrative remedy lies open to them but has not been pursued.

Which Firms Must Disclose?

Under Phase III of the Economic Stabilization Program, quarterly reports to the CLC were required of all firms with annual sales or revenues of $250 million or more.

[6 C.F.R. § 130.21(b)]. Public disclosure was required of all such firms. (6 C.F.R. § 102.50). . Under Phase IV regulations, the number of firms required to report has been extended to include all firms with annual sales or revenues of $50 million or more (6 C.F.R. § 150.161), but the regulations retain the Phase III requirement that public disclosure applies only to those firms with annual sales or revenues of $250 million or more. (6 C.F.R. § 102.51). Plaintiffs contend that this Phase IV requirement is in violation of Section 205(b)(1), which provides in relevant part that "Any business enterprise subject to the reporting requirements under section 130.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973, shall make public any report. . . ."

The public disclosure section in question, Section 205 of the Act, was added to the statute during Phase III as a part of the Economic Stabilization Act Amendments of 1973, P.L. 93-28, April 30, 1973. Thus Congress considered the question of public disclosure in light of which firms were required under Phase III to report and to disclose, and explicitly required that the firms which would be required to disclose under the new Section 205 were those which were required to file quarterly reports "under section 130.21(b) of the [CLC] regulations in effect on January 11, 1973 . . .," that is, those with annual sales or revenues of $250 million or more. Plaintiffs would have us find that Congress did not mean what it said, but meant instead that disclosure was to be required of whichever firms were required to report to the CLC by the successor regulations to the Phase III regulation mentioned in Section 205 of the statute. They would have us require the CLC to issue new regulations requiring public disclosure of all firms of $50 million or more annual sales or revenues, since those firms are now required under Phase IV to file quarterly reports to the CLC.

We find it unnecessary to consider this issue at length. Section 205(b)(1) on its face clearly and specifically calls

for disclosure by those businesses that were required to report to the CLC by "section 130.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973." The statute plainly calls for disclosure only by firms of more than $250 million annual sales or revenues, and the CLC Phase IV regulations being challenged do likewise.

WHAT INFORMATION MUST BE DISCLOSED?

Plaintiffs' principal contention below, and on this appeal, is that specified parts of the CLC's regulations (Subpart F of Part 102, 6 C.F.R. §§ 102.51-102.56), determining what information reported to it is subject to public disclosure, are illegal because they are contrary to the requirements of Section 205(b)(3) of the Act. Section 205(b)(3) provides:

> Immediately upon enactment of this subsection, the President or his delegate shall issue regulations defining for the purpose of this subsection what information or data are proprietary in nature and therefore excludable under paragraph (2), except that such regulations may not define as excludable any information or data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 by a business enterprise exclusively engaged in the manufacture or sale of a substantial product as defined in paragraph (1). Such regulations shall define as excludable any information or data which concerns or relates to the trade secrets, processes, operations, style or work, or apparatus of the business enterprise.

This subsection thus operates as a limitation on the discretion of the CLC, granted by Section 205(b)(2), to exclude from public disclosure information or data that is proprietary in nature. Any information submitted to the CLC must fall into one of the three statutory categories: (1) information concerning trade secrets, etc., which must be excluded from public disclosure, (2) information which would have to be reported to the Securities and Exchange

Commission (SEC) by a single product-line or single service-line company, which cannot be excluded from public disclosure, and (3) all other information, which the CLC may or may not define as proprietary and thus excludable from public disclosure.

The CLC's regulations require the filing of quarterly reports on its forms CLC-2 (Phase III) or CLC-22 (Phase IV). The forms must contain the information specified therein. For the purposes of public disclosure, Section 102.54(a)(3) provides that each firm shall submit with its quarterly report four extra, or "public disclosure" copies from which has been omitted all information or data defined as proprietary and excludable from public disclosure by Sections 102.55 or 102.56. Section 102.54(c) provides that interested persons may examine the public disclosure copies of the reports at the appropriate Internal Revenue Service District Office.

Sections 102.55 and 102.56 specify which items on forms CLC-2 and CLC-22 are proprietary (excludable) information. A reading of those sections will reveal that the CLC has defined as proprietary all items which are, or are based on, annual sales or revenues, net sales, operating income, and sales by product line or service line. None of the parties disputes that such accounting items are required to be reported to the SEC. However, as the CLC points out in Section 102.55(a)(2), its definitions for net sales and operating income "are not the same as those used for SEC purposes because they exclude revenues from foreign operations, public utilities, farming activities and insurance activities. Since such general financial data, thus more narrowly defined, is not required for SEC purposes, it can be excluded from the public annual reports to the SEC and is, therefore, defined as proprietary data. . . ." Annual sales or revenues is also defined as proprietary, on the basis that the CLC's "special definition of annual sales or revenues results in a figure not disclosed in the SEC Form 10-K." Section 102.55(a)(1).

This dispute thus focuses upon the meaning of that clause of Section 205(b)(3) of the Act which prohibits the CLC from defining as proprietary and excludable from public disclosure "information or data which cannot currently be excluded from public annual reports . . ." to the SEC. Plaintiffs contend that the words "information or data" mean "types of information or data," that since annual sales or revenues, net sales, and operating income are required by the SEC, then the CLC is bound by the statute to define such items as nonproprietary information, and that the statutory command applies regardless of the variation in defining the items by the CLC and the SEC. The actual effect of the defendants' argument, although disclaimed by intervenor, is that the words "information or data" mean "numerically identical information or data." Defendants contend that since, for example, the net sales figure reported on the CLC form will not be the same figure as the net sales figure reported to the SEC, then the CLC form net sales figure is not SEC data, and the CLC is not prohibited by the statute from defining its net sales figures as proprietary and excludable from public disclosure. Defendants also argue that the CLC was bound to define very narrowly what information is nonproprietary because Section 205(a) makes reference to 18 U.S.C. § 1905, which provides criminal penalties for any officer of the government who "discloses, or makes known in any manner or to any extent not authorized by law" any information required to be filed with an agency. The plaintiffs respond by noting that in this case the defendants were not only authorized to disclose the information, but were forbidden by the statute from withholding it. Further, they note that Section 205(a) specifically excepts Section 205(b) from the reference to the applicability of 18 U.S.C. § 1905.

Although both plaintiffs and defendants have brought certain portions of the legislative history to our attention, we have found, and the parties do not argue otherwise, that the legislative history as a whole is not clearly dispositive

of the problems outlined above. The Congressional purpose in amending Section 205 was to grant access by interested members of the public to financial data on CLC reporting forms so that the public could better monitor the degree of compliance by business with the Economic Stabilization Program. The amendment's sponsor and principal supporters stated that it would give the public a basis for making independent judgments on reporting companies' compliance with the rules of the program, and that it would put these companies on notice that price increases above 1.5 percent on any substantial product would subject them to public scrutiny. S. Rep. No. 93-63, Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess. 8 (1973). Plaintiff Senator Hathaway was the author of the original amendment, which is now Section 205(b)(1). Standing alone this amendment would apparently have made almost all information reported to the CLC subject to public disclosure. The Senate then adopted an amendment, now Section 205(b)(2), which was offered by Senator Tower. This amendment provides that *proprietary* information concerning income, profits, losses, and costs could be excluded from public disclosure. Senator Hathaway proposed another amendment, which was adopted and is now Section 205(b)(3). Cong. Rec., March 20, 1973, S 5314. As discussed above, it is Section 205(b)(3) that provides which information can or cannot be defined as proprietary.

The CLC argues that its regulations permit public access to sufficient information to monitor compliance with the program. The Business Roundtable argues that to require the public disclosure of the business information sought by plaintiffs would give an unfair competitive advantage to a reporting firm's foreign and domestic competitors who are not required to report. Neither argument is responsive to the issue of whether the public disclosure regulations meet the terms of the statute requiring their promulgation. Whether the public is provided sufficient information to monitor compliance, and whether some adverse competitive

advantages may result, are public policy considerations within the usual province of the Congress.[2]

CLC gives no reasonable explanation related to the objectives of the Act,[3] particularly Section 205 forbidding the CLC to "define as excludable *any* [SEC] information or data . . . ," as to *why* the CLC decided that the information in dispute was not SEC data and therefore should be withheld from public disclosure. The only reasons advanced are that the CLC and SEC definitions are not the same, thus the figures reported will not be the same, and that, therefore, the CLC contends, it may define the information as proprietary because it is not SEC data. We are not told on what basis the CLC decided that *Congress* intended public disclosure only of information or data which has been defined identically by both agencies. While there are generally recognized meanings for the accounting terms "sales," "net sales," "operating income," etc., we think it is indisputable that different companies, and different government agencies, will use slightly varying methods of computing these figures to meet the needs of the companies or agencies. Indeed, it is probably the rule, rather than the exception, that one will find minor definitional differences between businesses and between agencies. Congress surely knew this when it enacted Section 205(b)(3), and, therefore, we find it unrealistic to assume, as defendants' argument would have us do, that Congress intended "information or data" to mean "numerically identical information or data." Instead, we think that when Congress, with

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[2] In *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), cited in *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971), the Supreme Court stated: "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."

[3] Section 202 states that the objectives are "to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar . . . ."

knowledge that the SEC requires public disclosure of, for example, net sales figures reported to it, enacted Section 205(b)(3) forbidding the CLC to define as proprietary any information required to be reported to the SEC, Congress intended that any net sales figures reported to the CLC could not be defined as proprietary and excludable.

The defendants' position on this issue results in an anomaly. While Congress used the mandatory language "may not define as excludable," which would seem to leave no discretion, the CLC's rationale would permit it to avoid completely the effect of this provision of the statute by simply using definitions which differed from those of the SEC. We think Congress intended these words to have an effect, and that that intended effect was to withhold from the CLC any discretion to exclude from public disclosure business information required by the SEC.

Defendants argue that they were required to define very narrowly what information is nonproprietary because Section 205(a) makes reference to 18 U.S.C. § 1905, which provides criminal penalties for any officer of the government who "discloses, or makes known in any manner or to any extent not authorized by law," any information required to be filed with an agency. While we understand that the CLC is conscientiously endeavoring to release only that information which it is authorized to release, in this case the CLC was not only authorized to release the information, it forbidden by Section 205(b)(3) from defining the information as proprietary and preventing its release. Furthermore, the CLC apparently overlooked the fact that the reference to 18 U.S.C. § 1905 in Section 205 (a) is preceded by the words "Except as provided in subsection (b) . . . ." We hold that for these reasons the members of the CLC have no need to fear prosecution under 18 U.S.C. § 1905 for defining information reported to the CLC as nonproprietary when the statute required them to do so.

Having found that the CLC regulations defining proprietary information, 6 C.F.R. § 102.55(a)(1), (2), and (4); 6 C.F.R. § 102.56(a)(1), (2), and (4), are illegal because in contravention of Section 205(b)(3) of the Act, we turn to the question of the relief to be given the plaintiffs. Considering the emergency nature of the stabilization program being administered by the defendants, we think it is not inappropriate to consider the impact that an invalidation of these regulations might have on administration. Fortunately it appears that in this case there will be very minimal, if any, disruptive effects caused by such a determination. The CLC will be required to issue new regulations in conformance with this opinion.[4] Other than that, however, there will be no additional "red tape" for the defendants, reporting businesses, or the members of the public. The reporting businesses will continue to submit public disclosure copies of the reports, and the public will examine them as it has before. The only difference will be that the CLC, through its new regulations, will

[4] For the guidance of the court below and the parties, the above sections of the regulations (and their predecessors dealing with form CLC-2) are held illegal insofar as they define as proprietary the information required on lines 7 through 18, line 24 (column 3), lines 27 through 33, and lines 35 through 39 of present form CLC-22. Section 205(b)(3) of the Act prohibits the CLC from defining as proprietary any information or data which would in fact be reported to the SEC by a single product-line manufacturer or seller. Slight definitional variances between CLC terms and SEC terms are not sufficient grounds for the CLC to define information as proprietary when that information is of the same nature as that required by the S.E.C. Unless a reasonable explanation, related to the objectives of the Act, is shown, the CLC may not use definitional variances as a justification for issuing regulations which restrict the effectiveness of Section 205 in furthering public disclosure to insure compliance with the Act.

have reduced the number of items that may be omitted from the public disclosure copies.[5]

Accordingly, it is ORDERED that this cause be remanded to the trial court for further proceedings in accordance with this opinion; that the trial court's orders denying plaintiffs' motion for summary judgment and granting defendants' and intervenor's motions for summary judgment be vacated, and that plaintiffs' motion for summary judgment be granted only to the extent expressly indicated by this opinion; and that an injunction be issued ordering the CLC to prepare and issue new regulations in accordance with Section 205(b)(3) of the Act, as interpreted herein, to replace the existing Sections 102.55(a)(1), (2), and (4), and 102.56(a)(1), (2), and (4) of its regulations, defining proprietary information, as soon as is practicable under the circumstances.

So ORDERED.

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[5] We recognize, however, that for quarterly reports filed after the amendment of Section 205 on April 30, 1973, revised public disclosure copies, prepared in accordance with the regulations to be issued to replace those herein declared invalid, must be made available for examination by members of the public, in accordance with the "Disclosure procedure" prescribed by present 6 C.F.R. § 102.54.

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IN THE

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OCTOBER TERM, 1973

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v.

CONSUMERS UNION OF UNITED STATES, INC., ET AL.,

and

COST OF LIVING COUNCIL, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION OF THE BUSINESS ROUND TABLE FOR WRIT OF CERTIORARI

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA

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With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the petitioner.

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers (NAM) is a non-profit voluntary business association, organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing and related concerns of all sizes located throughout the United States and represents a substantial portion of the nation's industrial employment.

This case involves an issue of first impression concerning the disclosure required of certain firms under the Economic Stabilization Act. The decision of the Temporary Emergency Court of Appeals, if left standing, will place firms subject to the regulations at a serious competitive disadvantage vis-à-vis domestic and foreign firms which are not subject to the regulations. Many of these disadvantaged firms are members of the NAM.

Accordingly, the NAM has proper interest in the resolution of the issues before the Court in this case.

ARGUMENT

1. The Present Case Involves a Significant Interpretation of the Economic Stabilization Act.

Although the present Economic Stabilization Act will expire April 30, 1974 and no one knows what, if any, legislation will be enacted to replace or continue the present Act, the issue presented by this case will not be mooted in any event. The decision of the lower court requires public disclosure by product line of information submitted to the Cost of Living Council in quarterly reports. Since this disclosure applies only to firms with annual sales or revenues of $250,000,000 or more, the application of the disclosure provisions

is discriminatory. It will give both foreign and domestic competitors pertinent sales trends and other information covering at least a one year period, which would interfere with the competitive position of the firms subject to the disclosure requirement.

The broad decision of the lower court applied the disclosure requirements to Phase IV as well as Phase III. Information could be disclosed even though the firm was in compliance with Phase IV regulations, if a price increase violated the now obsolete Phase III criteria. For these reasons the decision in this case will adversely affect the present competitive position of firms subject to disclosure regardless of any change in the law.

While the NAM disagrees with the interpretation of Section 205 as it applies to Phase III, if that interpretation were not applied to Phase IV, it would not have sufficient adverse impact to warrant this Petition.

2. The Lower Court Erred in Requiring that Its Interpretation of the Act Under Phase III Be Carried Over and Applied to Phase IV.

There is no reasonable basis to carry over the interpretation of Section 205 from Phase III to Phase IV. The purpose of the disclosure amendment, sometimes called the Hathaway Amendment, was to publicize certain statistics of firms which raised prices in excess of the Phase III criteria. Its purpose was to utilize public opinion to encourage compliance with the standard. This is demonstrated by Senator Hathaway's statement:

> "My amendment, without interfering with the looser and self-administered aspects of Phase III, just gives these companies the impetus to keep

price increases in line with Phase III guidelines . . . ." (119 Daily Cong. Rec. S 5119)

If this reasoning had any merit during Phase III, it disappeared in Phase IV. This is because Phase III was administered through "voluntary" and "self-administering" methods. (See Senate Committee on Banking, Housing, and Urban Affairs, Report No. 93-63). New sanctions were added for Phase IV. Now the Cost of Living Council regulations provide for criminal fines and civil penalties. Injunctive and other relief are also provided in Sections 140.41 and 140.42.

In Phase III a company could increase prices to reflect increased costs so long as there was no increase in its profit margin. Alternatively prices could be increased by a weighted annual average of 1.5 percent without regard to the profit margin limitation. Phase IV is quite different. Price increases are permitted only to reflect a dollar for dollar pass through of additional costs. In addition, the Cost of Living Council must approve exceptions; in Phase III there was a self-executing exceptions procedure.

The lower court made the disclosure provisions applicable to Phase IV because Section 205 was carried over to Phase IV without change. The substantially changed circumstances would not necessitate the carrying over of Phase III disclosure regulations to Phase IV. The retaining of the limited disclosure regulations was a discretionary act of the agency. This is also demonstrated by the Cost of Living Council's preamble to its Phase IV regulations which stated, "The record is simply not conclusive either way in resolving the central issue of whether or not Section 205 (b), which incorporates a Phase III regulation, survived

Phase III and has continued applicability in Phase IV. The choice must therefore be made between the competing policy alternatives. . . ."

In *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971), this Court reviewed an action by the Secretary of Transportation authorizing the use of federal funds to finance the construction of a highway through a public park. The Court said that in reviewing the action under the Administrative Procedure Act, 5 U.S.C. § 706 (2) (A), the Court was required to make a finding that the Secretary's choice of the location for the highway was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". To make that decision a court must consider whether the decision was based on relevant factors. "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is narrow one. The court is not empowered to substitute its judgment for that of the agency." (p. 416)

The criteria of the Administrative Procedure Act was expressly made applicable to the Economic Stabilization Act in Section 211 (d) (1). Thus the same criteria should be applied in the present case that was applied in *Citizens* v. *Volpe.* It is submitted that the lower court erroneously substituted its judgment for that of the agency when it determined that its expanded disclosure provisions of Phase III *must* be applied to Phase IV. The different nature of the Phase IV regulations means that the agency has discretion to determine appropriate disclosure regulations. Therefore, the lower court exceeded its authority when it applied its decision to Phase IV.

CONCLUSION

It is submitted that this court should grant the Petition for a Writ of Certiorari because this case involves a significant interpretation of the Economic Stabilization Act giving some firms an unfair competitive advantage, and the court below in its decision erroneously substitutes its judgment for that of the agency in extending Phase III regulations to Phase IV.

Respectfully submitted,

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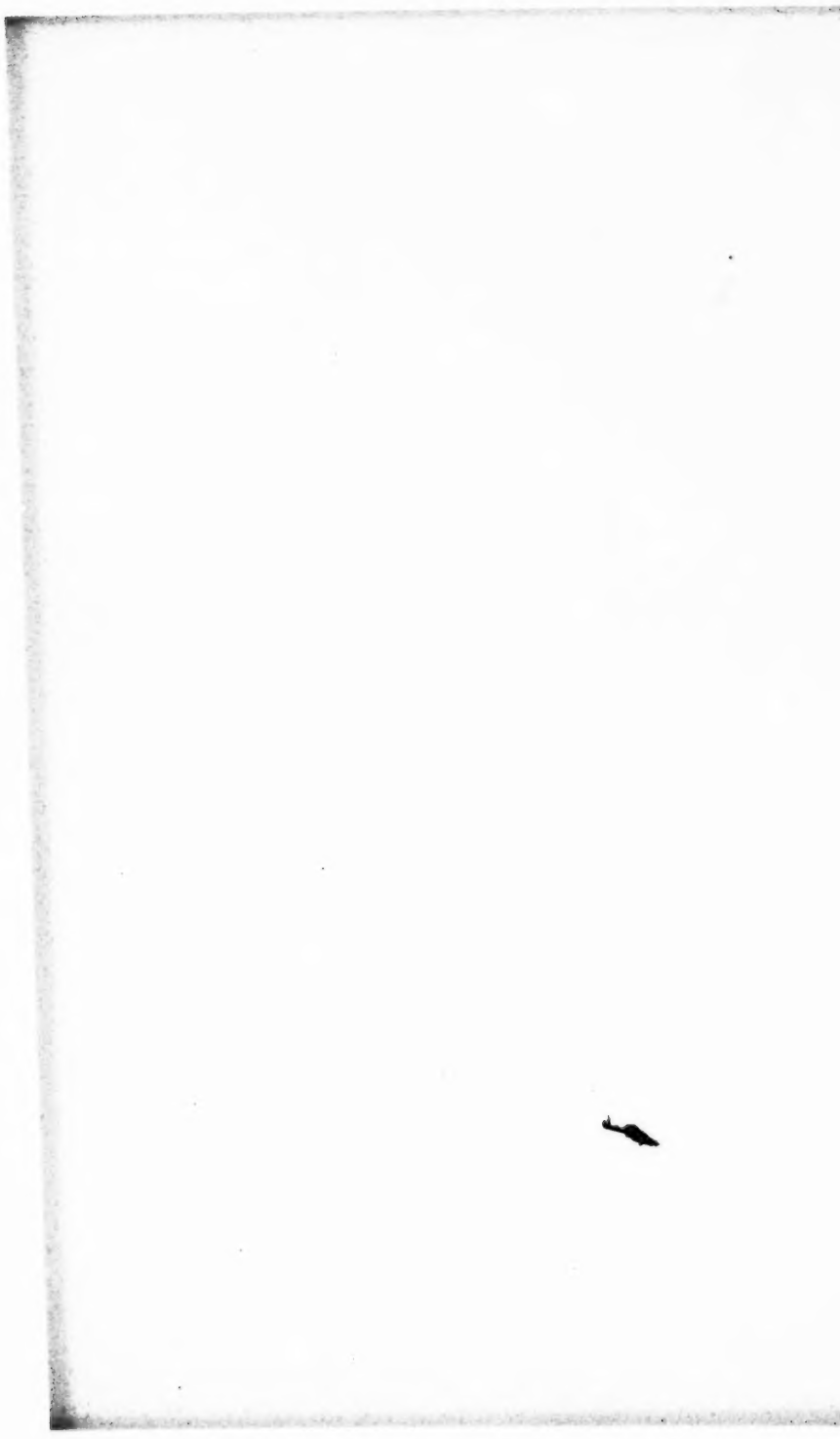

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and
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Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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Respondents Consumers Union of United States, Inc., Senator William D. Hathaway and Peter J. Petkas, respectfully oppose the Petition for Writ of Certiorari for the reason that the decision of the Court below fully and adequately disposes of this case and there are no special and important reasons for granting the writ.

STATUTORY PROVISIONS INVOLVED

Economic Stabilization Act of 1970, as amended:

"Section 205. Public Disclosure." – [87 Stat. 28-29]

While Petitioner accurately sets forth the full text of Section 205 of the Economic Stabilization Act, as amended ("Section 205"), it inexplicably cites the former title to that Section – "Confidentiality of Information"[1] – which was discarded by Congress in the April 30, 1973 amendments to the Act. The new (and current) title – "Public Disclosure" – was adopted along with the 1973 amendments, which greatly increased the amount and type of data required to be disclosed.[2]

"Section 211. Judicial Review – [85 Stat. 749]

(b)(2) Except as otherwise provided in this Section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder."

"Section 218. Extension of Act – [87 Stat. 29]

Section 218 of the Economic Stabilization Act of 1970 is amended by striking out "April 30, 1973" and "May 1, 1973" and inserting in lieu thereof "April 30, 1974" and "May 1, 1974," respectively."

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[1] Petition for Writ of Certiorari, p. 3, ("Petition").

[2] PL 93-28, April 30, 1973.

United States Code, Title 18:

"Section 1905 [62 Stat. 791] Disclosure of confidential information generally.

Whoever, being an officer or employee of the United States or of any agency or department thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any *** report or record made to or filed with such department or agency *** shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

STATEMENT

Petitioner's statement is generally adequate, and Respondents rely thereon except in two respects. *First,* Petitioner notes that the Cost of Living Council ("the Council") in its public disclosure regulation, "expressed some doubt" that Section 205 survived Phase 3. Petition, p. 6. Petitioner fails to add that the Council resolved whatever "doubt" it had by applying Section 205 to Phase 4 quarterly reports.

Second, events now confirm that Respondents did indeed exhaust their administrative remedies. By letter dated March 1, 1974, Consumers Union renewed its earlier request to Executive Director of the Council, John T. Dunlop, a defendant in this case, to promptly act on plaintiffs' administrative appeal. On March 11, 1974, Attorney Amanda Peterson, of the Council's Office of General Counsel, telephoned counsel for Respondent Consumers Union to state that Dr. Dunlop had, on the basis of the District Court ruling, denied the administrative appeal in a letter dated November 14, 1973.

Apparently, this letter was never received. The Council has now provided Respondent Consumers Union with a copy of the November 14 letter. The texts of both letters are attached hereto as the Appendix.

THERE IS NO BASIS FOR GRANTING THE WRIT

Petitioner's thirty-five page brief contains less than three pages which address the only substantive issue in this case – the construction of Section 205.[3] The argument presented in those three pages is not an argument on which the Council relied in its public disclosure regulation ("the Regulation"), nor was it an argument relied upon by the Government in the Courts below. Finally, Petitioner's *sole* substantive argument utterly fails to address the arguments which Respondents successfully advanced in the Temporary Emergency Court of Appeals ("the Emergency Court") but, rather, asks this Court to undertake the very balancing of interests which the Emergency Court holds to be "public policy considerations within the usual province of the Congress".[4] Thus, if this Court grants certiorari it would – because the Government, which in the Courts below relied on arguments of statutory construction, has foregone judicial review – be presented with an essentially different case from that decided below.

It is also significant that the Economic Stabilization Act is temporary legislation which, under the terms of Section 218 of the Act, as amended, expires on May 1, 1974, and it is not clear at this time that the Congress will extend the Act beyond that date. Thus, this case may not present

[3] Petition, pp. 33-35.

[4] Petition, Appendix G, p. 54a.

a matter of future significance. Further, legislation now pending, including Senate Bills S. 2961, 3148 and 3032, give the Congress the opportunity to reverse the Emergency Court's decision if they do not agree with it or wish to change Section 205 as a matter of policy.

Petitioner here raises for the first time issues which neither Petitioner nor the Government raised at any point in the lower Court proceedings[5] – issues of standing, ripeness, and exhaustion of administrative remedies. Of these, only the exhaustion issue was considered by the Emergency Court (and that, *sua sponte*), and it had no difficulty in determining that none of the policy reasons for exhausting administrative remedies applies to this case, which involves a single issue of statutory construction.[6] The standing and ripeness issues, except in extraordinary circumstances neither demonstrated nor existing here, may not be raised on appeal, much less before this Court, where they have not been raised at trial. *E.g., U.S. v. New York Tel. Co.*, 326 U.S. 638, 650n (1946); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Corrigan v. Buckley*, 291 U.S. 323, 329 (1926).

Petitioner establishes no "special and important" reasons for granting review, as required by Rule 19 of this Court. Nor can any such reasons be discerned. Indeed, if one existed, the Government surely would not have chosen to forego further judicial review.

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[5] Although Petitioner was an intervenor below, it fully participated in all briefing. Hence, Petitioner had ample opportunity to raise these issues either on motion for summary judgment in the District Court or on appeal in the Emergency Court.

[6] Petition, Appendix G, pp. 45a-48a.

This is a federal question of first impression which has been reviewed and disposed of by a special Court having exclusive primary appellate jurisdiction over the kind of substantive issue presented here.[7] Thus, no conflict among the appellate courts has occurred or, indeed, is possible even.

The only issue presented is a simple, routine one of statutory construction. No special expertise is needed to resolve it. No balancing of competing interests or considerations is required.

The Emergency Court held that the Council has "no reasonable explanation" which could relate the Regulation to the requirements of the statute, that the Council's position is "an anomaly", and that the Council has arrogated to itself *complete* administrative discretion where Congress has foreclosed *any* such discretion.[8] Therefore Petitioner raises no complex or novel questions of federal law and, hence, no reasons why this Court should grant certiorari.

RESPONDENTS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES

The Emergency Court raised the question of exhaustion of administrative remedies *sua sponte* in its January 11, 1974 decision. Neither defendant had raised the issue either at trial or on appeal. The Court had no difficulty in deciding that plaintiffs were excused from pursuing further administrative remedies. In view of the *Corrigan, Hormel* and *New York Telephone* cases, *supra,* it is doubtful that

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[7] PL 92-210, Section 211(b) (2), 85 Stat. 749.

[8] Petition, Appendix G, pp. 54a-55a.

Petitioner can raise the issue here for the first time. In any event, as noted above,[9] recent events make clear that this issue was rendered moot by the Council's November 6 denial of the administrative appeal, which probably accounts for the Council's failure to raise the issue.

SECTION 205 APPLIES TO PHASE 4, AND PETITIONERS MAY NOT RAISE THIS QUESTION FOR THE FIRST TIME ON APPEAL

Petitioner belatedly contends that Section 205 does not apply to Phase 4 of the Economic Stabilization program. This question was raised for the first time by the Government before the Emergency Court in its petition for rehearing subsequent to that Court's decision in this case. The Emergency Court denied the petition for rehearing without passing on this issue.

Under the doctrine stated in the *Corrigan, Hormel* and *New York Telephone Co.* cases, *supra,* it is doubtful that either defendant can properly raise this issue for the first time on appeal. And, in any event, the contention has no underlying basis, because the statute does not purport to terminate its application on the basis of a change in the Stabilization Program initiated by the executive.[10] Additionally, the Council, – whatever doubts it may have expressed about this question in the preamble to the Regulation

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[9] *Supra,* p. 3 and Appendix.

[10] The statute refers to a Council Phase 3 regulation. This reference is obviously for the purpose of identifying the specific Council records (*i.e.*, quarterly reports required by the cited regulation) in which the potentially disclosable information or data is to be found.

– clearly provided in the Regulation for application of Section 205 to Phase 4 information and data in a manner completely identical to Phase 3 application. The preamble clearly refers to the Regulations as being promulgated:

> *in accordance with the requirements imposed on the Council by Section 6 of the Economic Stabilization Act Amendments of 1973.* (Emphasis supplied.) [11]

In fact, the Council wrote the Phase 4 disclosure regulations under the impression – albeit a mistaken one – that Council officials could be subjected to criminal penalties provided for in Title 18 U.S.C., Section 1905 [12] if they interpreted Section 205 in favor of disclosure. The Government relied substantially upon this supposed stricture while defending in the Courts below the Council's narrow interpretation of Section 205. It was not until the Emergency Court rendered its opinion that the Council was relieved of this concern. [13] It is, therefore, highly unlikely that – as Petitioner contends – the Council thus concerned with possible criminal sanction, would write regulations requiring disclosure of *any* nonpublic corporate data relating to Phase 4 if it had found that Section 205 did not require disclosure. Petitioner's proposition in this regard is unfounded.

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[11] Petition, Appendix C, p. 20a.

[12] Making punishable by fine and imprisonment unauthorized disclosure by a government official or employee of confidential information "except as otherwise provided by law".

[13] The Emergency Court held that Section 1905 did not apply to the Council's regulation writing functions. Petition, Appendix G, p. 55a.

PETITIONER MAY NOT RAISE STANDING ISSUES IT FAILED TO RAISE BELOW AND, IN ANY EVENT, PLAINTIFFS' STANDING IS CLEAR

Petitioner's challenge of Plaintiffs' standing to maintain this action is clearly no more than an afterthought. Neither Petitioner nor the Government having raised this issue despite previous opportunity in the District and Emergency Courts, this Court will not entertain such a belated challenge. *U.S. v. New York Telephone Co., Hormel v. Helvering, Corrigan v. Buckley, supra.*

It is clear, in any event, that Plaintiffs have standing to sue. It is true that direct injury or adverse effect must be alleged in order for a party plaintiff to have standing. But Petitioner's own Statement recites both the allegations of interest (in the amended complaint) and the Council's denial of the statutory rights claimed by Plaintiffs. [14] This meets the requirements of both *Sierra Club v. Morton,* 405 U.S. 727 (1972) and *U.S. v. SCRAP,* ____ U.S. ____, 37 L.Ed. 2d 254 (1973). [15]

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[14] Petition, pp. 7-9, 10.

[15] See Petition, pp. 31-32. Petitioner apparently reads the *SCRAP* case – erroneously – as requiring identification of specific products and services for which consumers will pay higher prices as a result of agency action. But *SCRAP* was an Interstate Commerce Commission rate case. Here, the right granted by law is access to information and the most direct injury measureable is denial of access to that information. This injury has been alleged and is legally identical to the higher product prices alleged in *SCRAP.*

THE COURT BELOW PROPERLY OVERTURNED THE UNLAWFUL ADMINISTRATIVE INTERPRETATION OF THE STATUTE

The Emergency Court held that in Section 205, as amended, Congress used *mandatory* language requiring the Council not to define as "excludable from public disclosure data or information" meeting the test set forth in Section 205 (b) (3) of the Act, as amended. The Council, nevertheless, based its regulation on a rationale which would permit it to "avoid completely the effect of this provision of the statute . . .". This the Emergency Court described as "an anomaly". [16]

Petitioner argues that, "[a]ssuming the existence of" such a mandate, the Council "must nevertheless be permitted to determine what information reported to it falls within this nondiscretionary mandate". [17] This argument is fatally illogical, and would place the Council in precisely the position that Congress, according to the Emergency Court, prohibited the Council from assuming. For if an agency has the unreviewable authority to exercise discretion in interpreting a mandate which the Congress has placed upon it, there is no mandate, but a grant of discretion.

Petitioner also relies heavily on highly selected portions of the legislative history to support its proposition that the Court should not have overturned the regulation. [18] However, as the Emergency Court noted in its opinion,

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16 Petition, Appendix G, pp. 54a-55a.

17 Petition, p. 13.

18 Petition, pp. 14-19.

and as all parties agreed below, that history is ambiguous. It fails to illuminate the issue involved in this litigation. [19]

Petitioner would buttress its contention with a number of irrelevant cases [20] holding that the courts should defer to agency expertise in construing the application of a statute. But all of these involved the employment of agency expertise in applying a statute to a set of facts surrounding one or more business transactions. They do not involve, as is the case here, initial construction of a statutory phrase to determine whether the agency's interpretation of the phrase has deprived the provision of its basic meaning and thrust. As the Emergency Court held, the problem here is not the application of the Regulation but the comparison of the Regulation with the statute. [21]

Transformation of the Congressional mandate into an unfettered grant of discretion is not the only anomaly presented by the Council's regulation. The requirement (as a standard for disclosure of data under Section 205) that Council data be numerically identical to SEC data creates additional challenges to good logic and law, as well.

This requirement would suppose that Congress used the *annual* SEC reports as a standard for measuring disclosure of *quarterly* data submitted to the Council, even though the time difference of the reporting periods would render all quarterly data different and thus undisclosable. And it

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[19] Petition, Appendix G, pp. 52a-53a.

[20] *Perkins v. Matthews*, 400 U.S. 379, 391 (1971); *Rosado v. Wyman*, 397 U.S. 397, 415 (1970); *Federal Trade Commission v. Texaco*, 393 U.S. 223, 226 (1968); *Udall v. Tallman*, 380 U.S. 1, 4, 16 (1965), cited at Petition, p. 14.

[21] Petition, Appendix G, p. 47a.

would suppose that Congress, in order to discourage excessive price increases, provided for possible disclosure of only such data as is already available from SEC reports. These propositions – which are inherent in the Council's regulations – are on their face unsupportable.

PETITIONER'S SUBSTANTIVE ARGUMENTS RAISE ISSUES WITHIN THE PROVINCE OF CONGRESS, NOT THE COURTS

The gravamen of Petitioner's narrow substantive argument is that if Section 205 is applied as construed by the Emergency Court, information that will be made public which will permit competitors of disclosing firms to obtain information otherwise unavailable. This, Petitioner argues, is unfair "to the competitive business system". [22]

As the Emergency Court has already held, balancing considerations favoring public disclosure with those favoring secrecy ". . . are public policy considerations within the usual province of Congress". [23] And yet it is clear that Petitioner's sole argument regarding construction of the statute asks this Court to reverse the Emergency Court decision by engaging in a judicial balancing of these competing interests – notwithstanding that Congress has already engaged in the balancing process and spoken in a clear mandate. The Emergency Court properly held that this is a decision for the Congress, and that the Regulation has violated that decision.

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[22] Petition, pp. 33-35. The "unfairness", presumably, is that it will invite competition.

[23] Petition, Appendix G, p. 54a.

CONCLUSION

Because the mandate of the Emergency Court has been stayed pursuant to Section 211 (f) (85 Stat. 750) of the Act, Respondents respectfully pray that the Court expeditiously deny the Petition.[24]

Respectfully submitted,

ALAN MARK SILBERGELD,

PETER H. SCHUCK,

1714 Massachusetts Ave., N.W.
Washington, D.C. 20036

Counsel for Respondents
Consumers Union et al.

Of Counsel:

LOBEL, NOVINS and LAMONT
1625 I Street, N.W.
Washington, D.C. 20005

March, 1974

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[24] The Government has stated that it will not file a brief in this matter (although a short statement will be lodged with the Court). It is, therefore, requested that the briefs be distributed upon the filing of this brief, in accordance with paragraph 3 of Rule 24.

APPENDIX

Correspondence Relating to Administrative Appeal

ECONOMIC STABILIZATION PROGRAM
COST OF LIVING COUNCIL
WASHINGTON, D.C. 20508

Executive Secretariat

March 14, 1974

Mr. Mark Silbergeld, Esq.
Consumers Union
1714 Massachusetts Avenue, N.W.
Washington, D. C. 20036

Dear Mr. Silbergeld:

The Cost of Living Council is in receipt of your letter of March 1, 1974, requesting a decision on the appeal you filed with the Council from a decision rendered October 19, 1973, by Assistant Director for Public Affairs Richard Lukstadt. Your appeal was considered and a letter informing you of the decision thereon was mailed to you on November 14, 1973. Unfortunately, this letter apparently went astray and, therefore, I am enclosing a copy of it.

Sincerely,

/s/ Henry H. Perritt, Jr.
Henry H. Perritt, Jr.
Executive Secretary

Enclosure

CC: Honorable Charles McC. Mathias
William C. White, Esquire, Department of Justice
John G. DeGooyer, Esquire

A-2

Nov. 14, 1973

Mark Silbergeld, Esq.
Consumers Union
1714 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Silbergeld:

Reference is made to your letter of November 6, 1973, in which you appeal the decision made by Mr. Lukstat not to reveal certain information you requested.

Cost of Living Council regulations define the information you requested as proprietary, i.e., not subject to public disclosure (6 C.F.R. 102.55). These regulations were promulgated, pursuant to Section 205 of the Economic Stabilization Act of 1970, as amended, after careful consideration and deliberation. Further, the regulations at issue were challenged in Consumers Union et al. v. Cost of Living Council et al. (Civil Action 1426-73) and upheld by the Court on November 2, 1973 in a summary judgment proceeding.

Therefore, after careful consideration of all available evidence, your appeal must be, and is, denied.

Sincerely yours,

John T. Dunlop
Director

CONSUMERS UNION / A NONPROFIT ORGANIZATION / PUBLISHER OF CONSUMER REPORTS

Washington Office:
1714 MASSACHUSETTS AVENUE, WASHINGTON, D. C. 20036
202-785-1906

March 1, 1974

Dr. John T. Dunlop
Cost of Living Council
Washington, D.C. 20508

Dear Dr. Dunlop:

On November 6, 1973, we filed with you an appeal from a decision rendered October 19, 1973, by Assistant Director for Public Affairs Richard Lukstadt. Our appeal, at this writing, is almost four months old. A decision would be appreciated.

Mr. Lukstadt, in his October 19 letter to us, denied to us access to certain corporate data from quarterly reports contained in the Council's records. We requested the data under the provisions of the Freedom of Information Act in a letter to Mr. Lukstadt dated August 17, 1973. This data is made subject to public disclosure under the provisions of Section 205 of the Economic Stabilization Act, as amended. See Consumers Union v. Cost of Living Council, ___ F.2d ___, Temporary Emergency Court of Appeals, No. DC-17, January 11, 1974, reh den. Feb. 4, 1974, in which you are a named defendant.

Since Senator Mathias has held hearings on the procedures utilized at the Council, including the administrative appeals procedure, and has a continuing interest in

this matter, I am taking the liberty of providing him with a copy of this request.

Sincerely,

/s/ Mark Silbergeld
Mark Silbergeld

cc: Hon. Charles McC. Mathias
William C. White, Esq., Dept. of Justice
James Elkins, Esq., Dept. of Justice
John G. DeGooyer, Esq.

No. 73-1354

APR 12 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE BUSINESS ROUNDTABLE, PETITIONER

v.

CONSUMERS UNION OF THE UNITED STATES, INC.

AND

COST OF LIVING COUNCIL

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE COST OF LIVING COUNCIL

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1354

THE BUSINESS ROUNDTABLE, PETITIONER

v.

CONSUMERS UNION OF THE UNITED STATES, INC.

AND

COST OF LIVING COUNCIL

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE COST OF LIVING COUNCIL

The decision of the Temporary Emergency Court of Appeals involves a question of construction of Section 205 of the Economic Stabilization Act of 1970, as amended, 87 Stat. 27, which governs public disclosure of information furnished by reporting firms to the Cost of Living Council.

Section 205 permits reporting firms to exclude proprietary information from public reports and the President or his delegate is authorized to promulgate regulations defining "what information or data are proprietary in nature * * *." In defining proprietary information, however, "* * * such regulations may not define as excludable any information or data which cannot currently be excluded from public annual reports

to the Securities and Exchange Commission * * * by a business enterprise exclusively engaged in the manufacture or sale of a substantial product * * *."

The plaintiffs, Consumers Union of the United States, Inc., *et al.*, instituted this suit seeking a declaratory judgment that certain of the public disclosure regulations promulgated by the Cost of Living Council pursuant to Section 205 were illegal and seeking an injunction rescinding those regulations and requiring the issuance of new regulations.

Plaintiffs' principal contention is that the regulations violate Section 205 because they include as non-disclosable information certain types of data which must be submitted to the Securities and Exchange Commission. Pet. App. G at 50a. The Cost of Living Council contends that the definitions of the data it requires are not the same as those used by the Securities and Exchange Commission, since the definitions used by the Cost of Living Council are more detailed than those utilized by the Securities and Exchange Commission. Pet. App. G at 51a.

The district court granted the defendants' motion for summary judgment. Pet. App. F. The Temporary Emergency Court of Appeals reversed, Pet. App. G, holding, *inter alia*, that consideration of the appeal was not precluded by the plaintiffs' failure to exhaust their administrative remedies; that the differences between the definitions utilized by the Cost of Living Council and the Securities and Exchange Commission were minor, Pet. App. G at 54a; and that, therefore, the regulations were invalid as in violation of the limitation contained in Section 205 to the effect that the regulations could not provide for the non-disclosure of data required to be submitted to the Securities and Exchange Commission. Petitioner, defendant-intervenor below, seeks review of this judgment of the Temporary Emergency Court of Appeals.

While the Cost of Living Council agrees with petitioner that the decision of the Temporary Emergency Court of Appeals is erroneous, the Solicitor General, on behalf of the Council, decided neither to file a petition for a writ of certiorari nor to join in the petition filed by petitioner because the Economic Stabilization Act of 1970 expires on April 30, 1974.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.

[931-1974-04]

SUPREME COURT, U. S.

FILE

APR 19

MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1354

THE BUSINESS ROUNDTABLE, *Petitioner*,

v.

CONSUMERS UNION OF UNITED STATES, INC., ET AL.,

and

COST OF LIVING COUNCIL, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

REPLY BRIEF FOR THE PETITIONER

EDWARD A. MCCABE
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IN THE

Supreme Court of the United States

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THE BUSINESS ROUNDTABLE, *Petitioner,*

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and

COST OF LIVING COUNCIL, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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REPLY BRIEF FOR THE PETITIONER

This brief is submitted by Petitioner pursuant to Rule 24 in reply to the Opposition to Petition for Writ of Certiorari filed by Respondent Consumers Union.

1. In its Opposition, Respondent Consumers Union contends that this Court should deny certiorari

on the grounds that the Economic Stabilization Act, the statute which is the subject of this litigation, is temporary legislation which may expire on May 1, 1974, and that this case accordingly may not present a matter of future significance. (Opposition, pp. 4-5). Respondent goes on to argue that, if Congress disagrees with the decision of the Temporary Emergency Court of Appeals, it has the power to enact corrective legislation. (Opposition, p. 5). Of course, this same argument could be made about any court decision wrongly interpreting a federal statute. The deficiencies in Respondent's reasoning are twofold. First, this rationale would lead to the untenable conclusion that this Court should never grant certiorari in cases turning on the meaning of a statute because Congress may always change the statute if it does not approve of the decision. Second, corrective legislation does not necessarily operate retrospectively to eliminate the harmful effects of a wrong court decision. The result in this case could possibly be the harmful disclosure of information submitted to the Cost of Living Council (CLC) during the period the old law was in effect. Thus, the impact of the decision on parties affected, including members of Petitioner The Business Roundtable, may not be lessened by the possibility of corrective legislation.

Any argument that the Act may expire is merely conjectural, but even if the Act were not extended in any form, there would remain ample reason for this Court to grant certiorari and review the decision of the Temporary Emergency Court of Appeals because of the possibility of irreparable harm to those firms whose confidential business data might be subject to public disclosure.

2. Respondent Consumers Union maintains that this Court's decisions in *United States* v. *New York Telephone Co.*, 326 U.S. 638 (1946); *Hormel* v. *Helvering*, 312 U.S. 552 (1941); and *Corrigan* v. *Buckley*, 271 U.S. 323 (1926) foreclose review by this Court of the issues of standing and ripeness raised by Petitioner. In fact, none of these cases involved standing or ripeness, issues which go directly to this Court's jurisdiction under Article III of the Constitution. *Barlow* v. *Collins*, 397 U.S. 159 (1970). The portions of the *New York Telephone* and *Corrigan* decisions referred to by Respondent pertained to ordinary arguments on the merits of the particular case which were not mentioned below, and in *Hormel* this Court actually approved the consideration of an issue on appeal which was not raised below. Thus Respondent's own authorities do not support, and *Hormel* in fact rejects, Respondent's position on standing and ripeness.

3. As for exhaustion of administrative remedies, Respondent contends (Opposition, pp. 6-7) that the CLC's decision on its initial request for information has mooted this issue. Such is clearly not the case. Consumers Union has never requested *any* information from the CLC regarding Phase IV reports. Its only request, by letter of August 17, 1973, (Petition, App. E) was for Phase III data. Respondent, however, in its amended complaint and subsequent filings has sought Phase IV data, and the decision of the Temporary Emegency Court of Appeals extends to Phase IV filings. Thus, Respondent has still failed to exhaust its administrative remedies regarding a significant portion of the relief it seeks—that involving the CLC's Phase IV regulations, and this defect was not cured by the CLC's disposition of Respondent's Phase III request.

4. Respondent also contends that Petitioner has made only one substantive argument in support of the petition and that this single argument is inadequate in any event because it asks this Court to balance public policy considerations within the usual province of Congress. (Opposition, pp. 4, 12). Needless to say, because Petitioner has consistently contended that the CLC regulations are fully in accord with Section 205 as a matter of statutory construction, Petitioner's argument on the public policy issues hardly constitutes its "*sole* substantive argument" before this Court. More importantly, these public policy considerations were treated not in an effort to have this Court perform a legislative function but rather to illustrate the factors considered by Congress which were incorporated into the legislation in issue in this case. Petitioner has merely attempted to demonstrate the correctness of the CLC's action when viewed in the light of these considerations.

5. The fact that the Solicitor General has not petitioned for a writ of certiorari should not dissuade this Court from granting certiorari. The sole reasons advanced for the government's decision not to seek review are the pendency of legislation and the possibility that the Economic Stabilization Act will expire. As noted above, neither reason has merit especially from the standpoint of Petitioner and its members who could be directly and adversely affected by the operation of the decision below. Particularly interesting in the face of the government's decision not to seek a writ of certiorari, is the view of the CLC and the Solicitor General that the decision below is erroneous. CLC Memorandum, p. 3; Letter from Solicitor General Bork to John T. Dunlop dated March 4, 1974, attached hereto

as Appendix A, pp. 7-8. While error below may not necessarily be conclusive, in and of itself, on a petition for writ of certiorari, we suggest that, coupled with Petitioner's showing of the strong need for this Court's review of the case, the error of the decision below should carry substantial weight.

6. Finally, we submit that Respondent's Opposition has presented nothing to diminish the need for this Court's review of this case. Indeed, Respondent itself notes that this case involves "a federal question of first impression . . ." (Opposition, p. 6), and Respondent has not in any way refuted Petitioner's showing that review is indicated by the substantial questions presented, including, for example, Petitioner's point that the potential economic impact of the decision below is a matter of important public interest. (Petition, pp. 33-35). When these considerations are added to the government's view that the decision below is erroneous, the equities weigh heavily in favor of review by this Court.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD A. MCCABE
JOHN G. DEGOOYER
MARK SULLIVAN, III
JOHN H. SPELLMAN
Hamel, Park, McCabe & Saunders
1776 F Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

April 1974

APPENDIX A

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C. 20530

March 4, 1974

John T. Dunlop, Director
Economic Stabilization Program
Cost of Living Council
Washington, D.C. 20508

Dear Mr. Dunlop:

After careful review of the decision of the Temporary Emergency Court of Appeals, and after consultation with members of my staff and with attorneys in the Civil Division of the Justice Department, I have decided not to authorize the filing of a petition for a writ of certiorari in *Consumers Union of the United States, Inc., et al.* v. *Cost of Living Council, et al.*

The case involves an issue relating to public disclosure obligations under the Economic Stabilization Act. Specifically, it presents a question as to the scope of the Council's authority to classify as proprietary, and thus exempt from public disclosure, financial data furnished the Council by certain reporting firms. My decision not to seek Supreme Court review is based primarily on my judgment that the pendency of legislation which would clarify these issues makes this an inappropriate vehicle in which to seek further review. My decision in this case does not mean that I would be unwilling to authorize the filing of a petition in a subsequent case presenting the same or similar issues if they arose in a context more suitable for review.

Moreover, my decision not to seek Supreme Court review does not indicate agreement with the decision of the court of appeals. Indeed, in my view, the court's decision probably is erroneous. The court held that data submitted to the Cost of Living Council cannot be defined as

proprietary, and thus be immune from disclosure, if it falls within a category of data furnished in annual reports to the Securities and Exchange Commission. Since the Securities and Exchange Commission annual reports require almost all categories of financial data, public disclosure by the Cost of Living Council will be required even though data furnished to the Council may be far more specific in content than that furnished the Securities and Exchange Commission. Although the legislative history of the disclosure provisions is ambiguous, I do not believe that Congress intended such a result.

Sincerely

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General